

# TRANSCRIPT OF RECORD.

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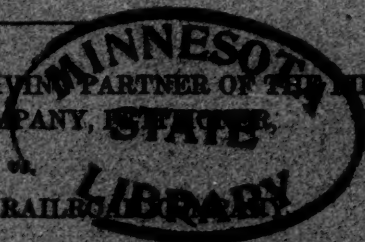
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 434.

MARY E. MEEKER, SURVIVING PARTNER OF THE FIRM  
OF MEEKER & COMPANY, ESTATE,

LEHIGH VALLEY RAILROAD

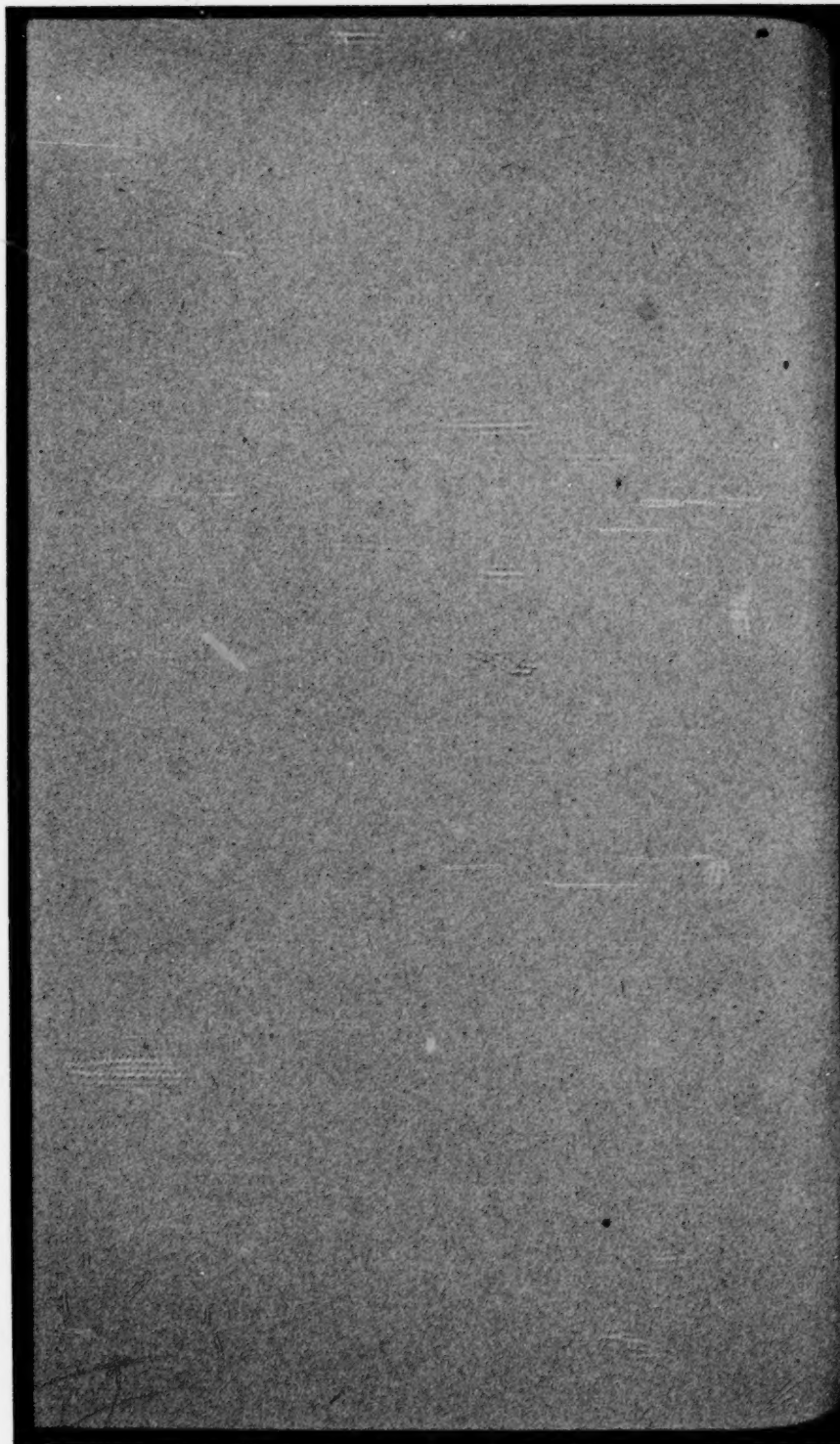


ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE THIRD CIRCUIT.

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PETITION FOR CERTIORARI FILED APRIL 8, 1914.  
CERTIORARI AND RETURN FILED MAY 6, 1914.

(24,151)





(24,151)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 434.

HENRY E. MEEKER, SURVIVING PARTNER OF THE FIRM  
OF MEEKER & COMPANY, PETITIONER,

*vs.*

LEHIGH VALLEY RAILROAD COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE THIRD CIRCUIT.

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*Transcript of Record.*

In the United States Circuit Court of Appeals for the Third Circuit,  
March Term, 1913.

No. 1721.

LEHIGH VALLEY RAILROAD COMPANY, Plaintiff-in-Error,  
vs.

HENRY E. MEEKER, Surviving Partner of the Firm of Henry E.  
Meeker and Caroline H. Meeker, Doing Business under the Trade  
Name of Meeker & Company, Defendant-in-Error.

In Error to the District Court of the United States for the Eastern  
District of Pennsylvania.

*Docket Entries.*

September Session, 1912.

2146.

HENRY E. MEEKER, Surviving Partner of the Firm of Henry E.  
Meeker and Caroline H. Meeker, Doing Business under the Trade  
Name of Meeker & Company,

vs.

LEHIGH VALLEY RAILROAD COMPANY.

John A. Garver, Wm. A. Glasgow, Jr.  
Edgar H. Boles, John G. Johnson.

- 1912, September 3. Petition filed.  
Order directing defendant to plead, answer  
or demur in twenty days filed.
- " " 4. Proof of service of copy of order to plead, etc.,  
filed.
- " October 5. Plea filed.
- " " 8. Order to place case on trial list filed.
- " " 23. Order for the appearance of Edgar H. Boles  
and John G. Johnson, Esquires, for defend-  
ant filed.
- " Nov. 11. Jury called.
- " " 12. Verdict for plaintiff, One Hundred and Nine  
Thousand Two Hundred and Eighty and  
17-100 (\$109,280.17) Dollars.
- " " 14. Plaintiff's bill of costs filed.  
Defendant's motion and reasons for new trial  
filed.

- “ Dec. 19. Argued sur motion for new trial.  
Order refusing motion for new trial and directing allowance of counsel fees filed.  
Præcipe for judgment filed. Judgment accordingly.  
Judgment filed.
- “ “ 30. Bill of Exceptions filed.  
Assignments of error filed.  
Petition for writ of error filed.  
Order allowing petition for writ of error filed.  
Bond sur writ of error in sum of Two Hundred and Eighteen Thousand Four Hundred and Sixty and 34-100 Dollars (\$218,460.34) filed.  
Order approving bond sur writ of error filed.  
Writ of error allowed and copy thereof lodged in Clerk's office for adverse party.
- “ “ 30. Citation allowed and issued.  
Stipulation for record sur writ of error filed.
- 1913, January 3. Citation returned, service accepted and filed.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judge of the District Court of the United States for the Eastern District of Pennsylvania, Greeting:

3 Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Henry Eugene Meeker, surviving partner of the firm of Henry E. Meeker and Caroline H. Meeker, doing business under the trade name of Meeker & Company, plaintiffs, and Lehigh Valley Railroad Company, defendant, a manifest error hath happened, to the great damage of the said Lehigh Valley Railroad Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Third Circuit, together with this writ, so that you have the same at the City of Philadelphia within thirty days, in the said United States Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable James B. Holland, Judge of the United

States District Court at Philadelphia, the 30th day of December, in the year of our Lord one thousand nine hundred and twelve.

[SEAL.]

GEORGE BRODBECK,  
*Deputy Clerk of the District Court  
of the United States.*

Before Holland, J.

Allowed:

BY THE COURT.

Attest:

GEORGE BRODBECK,  
*Deputy Clerk.*

4 In the District Court of the United States for the Eastern District of Pennsylvania, September Sessions, 1912.

No. 2146.

HENRY E. MEEKER, Surviving Partner of the Firm of Henry E. Meeker and Caroline H. Meeker, Doing Business under the Trade Name of Meeker & Company, Petitioner,

vs.

LEHIGH VALLEY RAILROAD COMPANY, Defendant.

*Petition.*

Filed Sept. 3, 1912.

To the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania:

Your petitioner, Henry E. Meeker, respectfully petitioning, shows your Honors:

I.

Your petitioner is lawfully and rightfully entitled to receive and does hereby claim of the Lehigh Valley Railroad Company, the defendant above named, the sum of Eleven Thousand and Nine Dollars and Thirty-three Cents (\$11,009.33), with interest at six per cent. (6%) per annum from August 1, 1901, to August 1, 1912, amounting to Seven Thousand Two Hundred and Sixty-six Dollars and Sixteen Cents (\$7,266.16), amounting to Eighteen Thousand Two Hundred and Seventy-five Dollars and Forty-nine Cents (\$18,275.49), in the aggregate, with legal interest from August 1, 1912; also the sum of Fifty-eight Thousand Two Hundred and Thirty-six Dollars and Forty-five Cents (\$58,236.45), with interest on the various individual charges comprising said sum at the rate of six per cent. (6%) per annum from the dates of payment thereof to September 1, 1911, amounting to Twenty-seven Thousand Seven Hundred and Fifty Dollars and Sixty-four Cents



(\$27,750.64), and legal interest at six per cent. (6%) per annum upon the sum of Fifty-eight Thousand Two Hundred and Thirty-six Dollars and Forty-five Cents (\$58,236.45), from September 1, 1911, to August 1, 1912, amounting to Three Thousand Two Hundred and Three Dollars (\$3,203.00), with legal interest at six per cent. (6%) per annum, from August 1, 1912, being an aggregate sum of Eighty-nine Thousand One Hundred and Ninety Dollars and Nine Cents (\$89,190.09), with legal interest on the same at six per cent. (6%) per annum from August 1, 1912, as and for damages and reparation, in accordance with a report and order of the Interstate Commerce Commission, dated May 7th, 1912, Docket No. 1180, Opinion No. 1880, a copy whereof is hereto attached, and prayed to be made and read as a part hereof, marked "Exhibit A" as amended by a subsequent order of the Commission of date June 15, 1912, a copy whereof is hereto appended and made a part hereof and marked "Exhibit B," and in accordance with the several acts of Congress in such case made and provided; and the petitioner shows that the defendant justly and legally owes to petitioner the sum above set forth, together with legal interest from the dates aforesaid and a reasonable attorney's fee to be taxed as part of the costs against the defendant.

## II.

The petitioner is a citizen and resident of the City of New York, State of New York, and is the surviving partner of the firm of Meeker & Company, of which petitioner and Caroline H. Meeker, now deceased, were formerly partners, the said Caroline H. Meeker having died pending the determination of the original complaint filed in this case before the Interstate Commerce Commission, and your petitioner having been duly and properly substituted on the record as such surviving partner.

Prior to all the dates and during all the periods of time named in this petition, the firm of your petitioner and Caroline H. Meeker under the firm name of Meeker & Company, was engaged in the business of buying, selling and shipping anthracite coal. The said business involved the shipping of large quantities of anthracite coals over the lines operated by the defendant, from mines and collieries situated in what is called the Wyoming coal region of Pennsylvania, to tidewater at Perth Amboy, New Jersey, and thence to the New York market.

At all the times herein mentioned the defendant was and still is a railroad corporation, organized and existing under the laws of the State of Pennsylvania, having its principal operating office in the State of Pennsylvania and the Eastern Judicial District of Pennsylvania, and its road runs through the Eastern Judicial District of Pennsylvania, and is a common carrier engaged in interstate railroad transportation of passengers and property between points in the States of Pennsylvania, New Jersey and New York, over its own lines of road, as well as over other lines owned, leased, controlled or operated by it.

## III.

In addition to the petitioner, there have been a number of other shippers engaged in shipping anthracite coal, as interstate commerce, over the said lines operated by the defendant from mines and collieries situated in the said Wyoming coal region to tide-water at Perth Amboy, one of whom was and still is the  
7      Lehigh Valley Coal Company, a corporation organized and existing under the laws of the State of Pennsylvania and engaged in the business of mining and buying anthracite coal, at mines and collieries in the said Wyoming coal region, and shipping the same, as interstate commerce, over the lines of the defendant, to tide-water, at Perth Amboy, New Jersey, and there selling it. Since the incorporation of said coal company, and during the period covered by this petition, the defendant owned or controlled its entire capital stock, and the two companies had virtually the same officers; and at least 75 per cent. of the anthracite coal transported by the defendant during the period covered by this petition was owned by said coal company.

From November 1, 1900, to August 1, 1901, the defendant, intending and purposing to unjustly and unreasonably discriminate in favor of and to prefer the Lehigh Valley Coal Company, of the stock of which company defendant was owner as aforesaid, to the petitioner and other independent shippers, charged the petitioner on all shipments of anthracite coal between the Wyoming coal region of Pennsylvania and Perth Amboy, New Jersey, rates in excess of the rates charged the Lehigh Valley Coal Company for shipments of anthracite coal over the same route between the same points, which said rates charged petitioner were unjustly discriminatory, and unjust and unreasonable, in violation of Sections 2 and 3 and Section 1, of the Act to Regulate Commerce, to the extent that they exceeded the rates charged the Lehigh Valley Coal Company on shipments of the same commodity between the same points of origin and destination, as was adjudged by the Interstate Commerce Commission in its reports and opinions, Docket No. 1180, Opinion No. 1585, filed June 8, 1911, hereto appended and made a part hereof and marked "Exhibit C," and Docket No. 1880, filed May 7, 1912, hereto appended and made a part hereof and marked "Exhibit A," resulting in a total discrimination against petitioner during the  
8      period from November 1, 1900, to August 1, 1901, as appears in report and order No. 1880, aforesaid, "Exhibit A," attached, and the Supplementary Order of June 15, 1912, "Exhibit B" attached.

During the period from November 1, 1900, to August 1, 1901, petitioner was unlawfully charged by defendant excessive and discriminatory rates upon 55,257.75 tons of anthracite coal of prepared sizes, 16,689 tons of pea coal, 11,448.93 tons of buckwheat coal and 4,926.77 tons of rice coal, shipped between the Wyoming coal region of Pennsylvania and Perth Amboy, New Jersey, the total charges paid on such coal amounting to One Hundred and Twenty-nine Thousand Nine Hundred and Eighty-nine Dollars and Eighteen Cents (\$129,989.18), at the unjustly discriminatory rates charged petitioner, whereas had petitioner been given the benefit of the rates

applied by defendant to similar shipments of the Lehigh Valley Coal Company, the total charge upon such shipments would have been One Hundred and Eighteen Thousand Nine Hundred and Seventy-nine Dollars and Eighty-five Cents (\$118,979.85), whereby defendant unlawfully and unjustly exacted from petitioner the sum of Eleven Thousand and Nine Dollars and Thirty-three Cents (\$11,009.33), during the period aforesaid, which sum, with interest thereon from August 1, 1901, was fixed and awarded by the Interstate Commerce Commission in favor of petitioner in their report, Opinion No. 1880, "Exhibit A," aforesaid, and in their Order thereto attached, and their supplemental order, Docket No. 1180, issued on June 15, 1912, hereto attached and made a part hereof and marked "Exhibit B."

#### IV.

From August 1, 1901, to July 1, 1907, the defendant charged and exacted from petitioner over its said line from the said Wyoming coal region to tidewater at Perth Amboy, New Jersey, the following unjust, unreasonable and excessive charges, upon all shipments of anthracite coal over said line, to wit: \$1.55 per ton for prepared coal, \$1.40 per ton for pea coal, \$1.25 per ton for buckwheat coal and \$1.10 per ton for coal smaller than buckwheat coal, which charges were continued in effect from August 1, 1901, to and after July 1, 1907, and constituted unjust, unreasonable, unlawful, excessive and unjustly discriminatory charges for such transportation by defendant.

From August 1, 1901, to July 1, 1907, petitioner shipped over the lines of the defendant from the breakers at the mines and collieries in the Wyoming coal region to tidewater at Perth Amboy, New Jersey, 246,870.15 tons of prepared sizes of such coal, 106,051.09 tons of the pea size of such coal, 87,250 tons of the buckwheat size of such coal, and paid charges thereon amounting to Six Hundred and Eighty-five Thousand Three Hundred and Seventy-five Dollars and Twenty-seven Cents (\$685,375.27), at rates exceeding \$1.40 per gross ton on prepared sizes, \$1.30 on pea coal and \$1.15 on buckwheat coal, which are the prices fixed by the Interstate Commerce Commission as proper and reasonable, and has paid charges thereon at rates in excess of those fixed as reasonable and proper by the Interstate Commerce Commission as aforesaid, the amount of such excess being Fifty-eight Thousand Two Hundred and Thirty-six Dollars and Forty-five Cents (\$58,236.45), paid by petitioner for defendant over and above the proper and reasonable charges for the same transportation under the rates fixed as aforesaid, as set forth in the Report and Award of the Interstate Commerce Commission, No. 1880, "Exhibit A" attached, and included in the award of the Interstate Commerce Commission, "Exhibit B" hereto attached.

The petitioner's firm was unable to continue its shipments of anthracite coal except by complying with the demands of the defendant as to rates; and all its said payments were made under duress; and in each and every case the said payments were made under protest, petitioner asserting that the rates charged were unreasonable and excessive, and notifying the defendant that the

right to recover back from it the amount of excess over the reasonable rate was reserved.

## V.

The petitioner, on July 17, 1907, filed with the Interstate Commerce Commission a complaint setting forth the unjust, unreasonable and discriminatory practices and charges of defendant, to the prejudice of petitioner and in violation of the Act to Regulate Commerce, approved February 4th, 1887, and the several acts amendatory and supplementary thereto, and praying that a hearing be had upon the allegations set forth in said complaint, and that the Interstate Commerce Commission make an order requiring defendant to cease and desist from the practices aforesaid, and fixing the proper and reasonable rate for transportation of anthracite coal over defendant's line from the Wyoming coal region to tidewater at Perth Amboy, New Jersey, and awarding complainants reparation in damages in such an amount as they might have suffered loss by reason of said improper practices and charges. Defendant being duly served with a copy of said complaint, made answer thereto; issue was joined, and the cause regularly heard and argued by all the parties thereto, and submitted, and a finding resulted, duly filed and reported by the Interstate Commerce Commission, at a general session at its offices in Washington, D. C., on June 8th, 1911, on Docket No. 1180, Opinion No. 1585, a copy of which finding, with the conclusions and orders of the Commission, is hereto attached and made a part hereof,

and filed and marked as "Exhibit C." with this petition. By 11 such finding the Interstate Commerce Commission held that the practices and charges of defendant complained of were unjust and unreasonable, and ordered that they be discontinued, and fixed the reasonable and proper charge for the transportation of anthracite coal over defendant's line between the points of origin and destination aforesaid (at \$1.40 per gross ton on prepared sizes, \$1.30 on pea coal and \$1.15 on buckwheat coal), and held that the complainants were entitled to recover all payments made over and above such just and reasonable charges. On May 7, 1912, a petition for rehearing filed by defendant was, at a general session of the Interstate Commerce Commission, after hearing, dismissed.

## VI.

After the filing of briefs by all parties and oral argument had at a general session of the Interstate Commerce Commission, upon the question of reparation, there resulted a further finding, regularly and properly made by the Interstate Commerce Commission, on May 7, 1912, Docket No. 1180, Opinion No. 1880, ordering the defendant to make reparation to your petitioner, as in paragraph I of this petition above set forth, and as fully appears in the copy of said report, conclusions and order of the Interstate Commerce Commission, a copy whereof is hereto attached, marked "Exhibit A," and made a part of this petition. The order appended to said report and findings was on June 15, 1912, at a general session of the Commission, amended as appears by a copy of said amended order, hereto attached and made a part hereof, and marked "Exhibit B."

## VII.

Petitioner avers that a true copy of the aforesaid order of the Interstate Commerce Commission, dated May 7, 1912, Docket No. 1180, Opinion No. 1880, and the amendment of said order of date

12 June 15, 1912, were duly served upon defendant in the above entitled cause, and demand made that defendant pay petitioner the sum claimed in this petition, and as set forth in the aforesaid orders of the Interstate Commerce Commission, "Exhibit A," and "Exhibit B" hereto attached, but that defendant has wholly failed, neglected and refused to pay the said sum or any part thereof, and that no such sum nor any part thereof has been paid by defendant or any one on its behalf, to petitioner or any one on his behalf. Wherefore petitioner has instituted this proceeding to enforce the aforesaid order regularly and lawfully made under the Act to Regulate Commerce, approved February 4th, 1887, and the several acts amendatory or supplementary thereto.

Wherefore, the said petitioner, Henry E. Meeker, respectfully prays:

First. That your Honorable Court enter a rule and order upon the said defendant, the Lehigh Valley Railroad Company, to file a plea, answer or demurrer to this petition within thirty days from date of service of a copy of the same upon said defendant.

Second. That your Honorable Court will, by its order, fix a time and place for the trial of this cause, under the provisions of the Act to Regulate Commerce, aforesaid.

Third. That your Honorable Court will hear, determine and adjudicate the matter involved in this cause hereinabove recited and the exhibits hereto attached.

Fourth. That your Honorable Court will enter judgment in favor of petitioner and against the said defendant, the Lehigh Valley Railroad Company, for the sum of One Hundred and Seven Thousand Four Hundred and Sixty-five Dollars and Fifty-eight

13 Cents (\$107,465.58), being the aggregate of the sum of Eighteen Thousand Two Hundred and Seventy-five Dollars and Forty-nine Cents (\$18,275.49), and the sum of Eighty-nine Thousand One Hundred and Ninety-Dollars and Nine Cents (\$89,190.09), together with legal interest from August 1, 1912, and costs, including a reasonable attorney's fee.

Fifth. That your Honorable Court may make such other order or orders in the premises as the necessity of the case may require or as to your Honorable Court may seem meet.

And your petitioner, as in duty bound, will ever pray, etc.

HENRY E. MEEKER,  
*Surviving Partner.*

STATE OF NEW YORK,  
*County of New York, ss:*

Henry E. Meeker, being duly sworn, deposes and says that he is the petitioner in the above entitled cause, and that the facts set forth



in the foregoing petition are true and correct, to the best of his knowledge, information and belief.

HENRY E. MEEKER.

Sworn and subscribed to before me this 30th day of August, A. D. 1912.

[SEAL.]

\_\_\_\_\_,  
*Notary Public.*

Notary Public, Kings County, No. 1. Certificate filed in New York County No. 1. King's County Register's No. 2529. New York County Register's No. 4028. Commission expires March 30, 1914. Customs Notary.

14

No. 11187.

STATE OF NEW YORK,

*County of New York, ss:*

I, William F. Schneider, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, do hereby certify, That Henry J. Dorgeloh has filed in the Clerk's Office of the County of New York, a certified copy of his appointment and qualification as Notary Public for the County of Kings, with his autograph signature, and was at the time of taking the annexed deposition duly authorized to take the same, and that I am well acquainted with the handwriting of said Notary Public, and believe that the signature to the annexed certificate is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court and County, the 31st day of August, 1912.

WILLIAM F. SCHNEIDER, *Clerk.*

## "EXHIBIT A."

*Opinion No. 1880.*

Interstate Commerce Commission.

No. 1180.

HENRY E. MEEKER and CAROLINE H. MEEKER, Co-partners,  
Trading as Meeker & Company,

vs.

LEHIGH VALLEY RAILROAD COMPANY.

No. 3235.

HENRY E. MEEKER

vs.

LEHIGH VALLEY RAILROAD COMPANY.

No. 1180.

HENRY E. MEEKER and CAROLINE H. MEEKER, Co-partners,  
Trading as Meeker & Company,

vs.

LEHIGH VALLEY RAILROAD COMPANY.

No. 3235.

HENRY E. MEEKER

vs.

LEHIGH VALLEY RAILROAD COMPANY.

Submitted February 27, 1912; Decided May 7, 1912.

Reparation awarded on account of unreasonable and discriminatory rates charged for the transportation of anthracite coal from the Wyoming region in Pennsylvania to Perth Amboy, N. J., in accordance with the conclusions announced in Meeker vs. L. V. R. R. Co., 21 I. C. C., 129.

16

William A. Glasgow, Jr., for complainants.

Frank H. Platt, George W. Field and E. H. Boles, for defendant.

*Supplemental Report of the Commission.*

McCHORD, Commissioner:

The original report in No. 1180, 21 I. C. C., 129, disposed of all the questions at issue except the claim for reparation, and the case was held open for the purpose of securing further information re-

garding that feature. A further hearing has been held, and complainant has presented exhibits showing the total number of tons of each variety of coal shipped and the amount of reparation due on such shipments. These exhibits have been examined by defendant and admitted to be correct.

In our original report we found that the rates charged complainant for the transportation of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., during the period from November 1, 1900, to August 1, 1901, were unjustly discriminatory, in violation of section 2 of the act to the extent that they exceeded the rates contemporaneously charged the Lehigh Valley Coal Company under the contract then in effect between that company and defendant; and we further found that the rates in effect from August 1, 1901, to July 17, 1907, were unreasonable to the extent that they exceeded rates of \$1.40 per gross ton on prepared sizes, \$1.30 on pea and \$1.15 on buckwheat.

On basis of our conclusions in the former report, and upon consideration of the evidence adduced at the hearing upon the question of reparation, we now find that during the period from November 1,

1900, to August 1, 1901, complainant shipped from the Wyoming coal region of Pennsylvania to Perth Amboy, N. J., 55,257.75 tons of coal of prepared sizes, 16,689.76 tons of pea coal, 11,448.93 tons of buckwheat coal, and 4,926.77 tons of rice coal, and paid charges thereon, amounting to \$129,989.18, at the rates found to have been unjustly discriminatory; that complainant has been damaged to the extent of the difference between the amount which he did pay and \$118,979.85, the amount which he would have paid had he been given the benefit of the rates applied by defendant to similar shipments of the Lehigh Valley Coal Company; and that he is, therefore, entitled to an award of reparation in the sum of \$11,009.33, with interest thereon from August 1, 1901. We find further that from August 1, 1901, to July 17, 1907, complainant shipped from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., 246,870.15 tons of coal of prepared sizes, 106,051.09 tons of pea coal and 87,250 tons of buckwheat coal, and paid charges thereon amounting to \$685,375.27, at the rates found to have been unreasonable; that complainant has been damaged to the extent of the difference between the amount which he did pay and \$626,945.62, the amount which he would have paid at the rates found reasonable, less \$193.20 deducted by stipulation of all parties on account of certain claims already paid; and that he is, therefore, entitled to an additional award of reparation in the sum of \$58,236.45, with interest, amounting to \$27,750.64, on the individual charges comprising said sum from the dates of payment thereof to September 1, 1911, together with interest on said sum of \$58,236.45 from September 1, 1911.

With the exception of the reparation features, the issues involved in No. 3235 have been passed upon by the Commission in No. 1180. The latter case covered the period from November 1, 1900, to July 17, 1907, while the instant case is designed to secure reparation upon

18 shipments which moved between July 17, 1907, and April 13, 1910. The petition in the present case, therefore, resolves itself into a prayer for reparation on shipments moving subsequent to the period covered by the original report, on basis of the conclusions announced in that report.

In No. 1180 the complaint attacked the reasonableness of rates charged by defendant for the transportation of various sizes of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., and asked reparation. On June 8, 1911, the Commission rendered its decision in that case. The petition in the present case was filed on April 13, 1910, or about a year prior to our decision in No. 1180. As before stated, it attacks the same rates that were found unreasonable in No. 1180, and asks reparation on shipments moving from July 17, 1907, to April 13, 1910.

The former case was filed with the Commission within one year from the passage of the law of June 29, 1906, and consequently was not limited to causes of action that accrued within two years prior to the filing of the complaint. The present proceeding, however, was instituted more than one year subsequent to the passage of that law, and is, therefore, subject to the two-year limitation of the statute. Complainant's prayer for reparation on shipments moving more than two years prior to the filing of the complaint in this case must be denied.

On basis of our decision in No. 1180, and upon consideration of the evidence submitted at the hearing of the present case regarding the amount of reparation due complainant, we now find that the rates exacted by defendant for the transportation of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., during the period from April 13, 1908, to April 13, 1910, were unreasonable to the extent that they exceeded rates of \$1.40 per gross ton on prepared sizes, \$1.30 on pea and \$1.15 on buckwheat; that complainant shipped from said point of origin to said destination during the period above set forth, 46,772.02 tons of coal of 19 prepared sizes, 26,972.06 tons of pea coal and 22,004.09 tons of buckwheat coal; that complainant paid charges thereon, amounting to \$136,663.41, at the rates herein found to have been unreasonable, and was damaged to the extent of the difference between the amount which he did pay and \$125,849.81, the amount which he would have paid at the rates above found reasonable; and that he is, therefore, entitled to an award of reparation in the sum of \$10,813.60, with interest amounting to \$1,526.53 upon the individual charges comprising said sum from the dates of payment thereof to September 1, 1911, together with interest on said sum of \$10,813.60 from the 1st day of September, 1911.

The exhibits showing details respecting the shipments upon which reparation is asked are too extensive to be set forth in this report. But inasmuch as the accuracy of the figures in said exhibits respecting the shipments made, freight charges paid and reparation due, is conceded of record by defendant, we deem it unnecessary to make detailed findings respecting the numerous shipments involved.

Orders will be issued in accordance with the findings herein announced.

*Orders.*

At a General Session of the Interstate Commerce Commission Held at Its Office, in Washington, D. C., on the 7th Day of May, A. D. 1912.

No. 1180.

HENRY E. MEEKER and CAROLINE H. MEEKER, Co-partners, Trading as Meeker & Company,

vs.

LEHIGH VALLEY RAILROAD COMPANY.

20 This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That defendant Lehigh Valley Railroad Company be, and it is hereby authorized and required to pay unto complainant, Henry E. Meeker, on or before the 15th day of July, 1912, the sum of \$11,009.33, with interest thereon at the rate of 6 per cent. per annum from the 1st day of August, 1901, as reparation for unjustly discriminatory rates charged for the transportation of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., which rates so charged have been found by this Commission to have been unjustly discriminatory, as more fully and at large appears in and by said report of the Commission.

It is further ordered, That defendant Lehigh Valley Railroad Company be, and it is hereby authorized and required to pay unto complainant, Henry E. Meeker, on or before the 15th day of July, 1912, the sum of \$58,236.45, with interest thereon at the rate of 6 per cent. per annum, amounting to \$27,750.64, upon the various individual charges comprising said sum, from the dates of payment thereof to September 1, 1911, as itemized in complainant's Exhibit 2, together with interest at the rate of 6 per cent per annum on said sum of \$58,236.45 from September 1, 1911, as reparation for unreasonable rates charged for the transportation of various shipments of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., which rates so charged have been found by this Commission to have been unreasonable, as more fully and at large appears in and by said report of the Commission.



HENRY E. MEEKER

v.

LEHIGH VALLEY RAILROAD COMPANY.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That defendant Lehigh Valley Railroad Company be, and it is hereby authorized and required to pay unto complainant, Henry E. Meeker, on or before the 15th day of July, 1912, the sum of \$10,813.60, with interest at the rate of 6 per cent. per annum, amounting to \$1,526.53 upon the various individual charges comprising said sum, from the dates of payment thereof to September 1, 1911, as itemized in complainant's Exhibit 1, together with interest at the rate of 6 per cent. per annum on said sum of \$10,813.60 from September 1, 1911, as reparation for unreasonable rates charged for the transportation of various shipments of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., which rates so charged have been found by this Commission to have been unreasonable, as more fully and at large appears in and by said report of the Commission.

By the Commission.

[SEAL.]

JOHN H. MARBLE, *Secretary.*

At a General Sessions of the Interstate Commerce Commission Held at Its Office, in Washington, D. C., on the 15th Day of June, A. D. 1912.

Charles A. Prouty, Judson C. Clements, Franklin K. Lane, Edgar E. Clark, James S. Harlan, Charles C. McChord, Balthasar H. Meyer, Commissioners.

No. 1180.

HENRY E. MEEKER and CAROLINE H. MEEKER, Co-partners, Trading as Meeker & Company,

vs.

LEHIGH VALLEY RAILROAD COMPANY.

*Supplemental Order.*

Upon further consideration of the record in the above entitled case, It is Ordered, That the order heretofore entered in this case on

the 7th day of May, 1912, be and the same is hereby amended so as to read as follows:

It is Ordered, That defendant Lehigh Valley Railroad Company be and it is hereby authorized and required to pay unto complainant, Henry E. Meeker, surviving partner of Henry E. Meeker and Caroline H. Meeker, co-partners, trading as Meeker & Company, on or before the 1st day of August, 1912, the sum of \$11,009.33, with interest thereon, at the rate of 6 per cent. per annum, from

23 the 1st day of August, 1901, as reparation for unjustly discriminatory rates charged for the transportation of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., which rates so charged have been found by this Commission to have been unjustly discriminatory, as more fully and at large appears in and by said report of the Commission.

It is Further Ordered, That defendant Lehigh Valley Railroad Company be and it is hereby authorized and required to pay unto complainant, Henry E. Meeker, surviving partner of Henry E. Meeker and Caroline H. Meeker, co-partners, trading as Meeker & Company, on or before the 1st day of August, 1912, the sum of \$58,236.45, with interest thereon at the rate of 6 per cent. per annum, amounting to \$27,750.64, upon the various individual charges comprising said sum, from the dates of payment thereof to September 1, 1911, as itemized in complainant's Exhibit 2, together with interest at the rate of 6 per cent. per annum on said sum of \$58,236.45, from September 1, 1911, as reparation for unreasonable rates charged for the transportation of various shipments of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., which rates so charged have been found by this Commission to have been unreasonable, as more fully and at large appears in and by said report of the Commission.

By the Commission:

[SEAL.]

JOHN H. MARBLE, *Secretary.*

*Opinion No. 1585.*

Before the Interstate Commerce Commission.

No. 1180.

HENRY E. MEEKER and CAROLINE H. MEEKER, Co-partners, Trading as Meeker & Company,

vs.

LEHIGH VALLEY RAILROAD COMPANY.

Decided June 8, 1911.

*Report and Order of the Commission.*

No. 1180.

HENRY E. MEEKER and CAROLINE H. MEEKER, Co-partners, Trading as Meeker & Company,

vs.

LEHIGH VALLEY RAILROAD COMPANY.

Submitted May 15, 1911. Decided June 8, 1911.

1. Upon shipments of anthracite coal made by complainants from the Wyoming region in Pennsylvania to Perth Amboy, N. J., during the period from November 1, 1900, to August 1, 1901, the rates collected by defendant were unjustly discriminatory and resulted in damage to complainant, for which reparation will be awarded.
2. Defendant's present rates for the transportation of anthracite coal in carloads from the Wyoming region in Pennsylvania to Perth Amboy, N. J., of \$1.55 per gross ton on prepared sizes, \$1.40 on pea coal and \$1.20 on buckwheat coal, found unreasonable to the extent that they exceed \$1.40 on prepared sizes, \$1.30 on pea coal and \$1.15 on buckwheat coal, which latter rates are established as maxima for the future, reparation to be awarded on basis of the latter rates as to shipments made by complainants since August 1, 1901.

William A. Glasgow, Jr., and John A. Garver for complainants.  
J. F. Schaperkotter, Frank H. Platt and George W. Field for defendant.

*Report of the Commission.*

McCHORD, *Commissioner*:

Henry E. Meeker and Caroline H. Meeker, co-partners, trading as Meeker & Company, complainants in this proceeding, were, when

the complaint was filed, engaged in the business of buying, shipping and selling anthracite coal over the lines of the Lehigh Valley Railroad Company from mines and collieries situated in the Wyoming coal region of Pennsylvania to tidewater at Perth Amboy, N. J., and thence to the New York market.

During the pendency of the proceeding Caroline H. Meeker died, and it has been continued to be prosecuted in the name of the surviving partner, Henry E. Meeker.

Complainants were not mine operators, but merely dealers on the New York market. The coal shipped by them to Perth Amboy was purchased from the Stevens Colliery, which is situated near the city of Wilkes-Barre, Pa., on the West Pittston branch of defendant's Wyoming Division, 1.5 miles from Coxton and 165 miles from Perth Amboy.

26 Practically all the anthracite coal deposits in the United States are in nine counties in the eastern portion of Pennsylvania, in an area comprising about 496 square miles. The different coal fields are as follows: The northern, commonly called the Wyoming, from which the shipments involved in this proceeding were made; the eastern middle and western middle, which together are known as the Lehigh regions, and the southern, which also bears the name of Schuylkill. All three regions are reached by the Lehigh Valley Railroad. The northern field is some 55 miles in length, has a maximum width of about 5 miles, and lies northwesterly of the Pocono Mountains, in the valley of the Lackawanna and Susquehanna Rivers. From this valley the carriers find comparatively easy outlets to points north and west, along the rivers mentioned, but coal shipped to the east over defendant's line has to be carried over the mountains at a maximum elevation of 1,750 feet. The lowest portions of the valley are about 500 feet above the level of the sea.

The coal mines are usually located at points separated from carrier's main tracks by distances varying from a fraction of a mile to several miles, and connected with such tracks by lateral lines called branches or spurs. These branches are sometimes constructed by the mine operators, but generally by the carriers. The manner in which the coal is handled at the mine openings and while in process of transportation is as follows: For convenience in handling the coal at the mouths of the mines and preparing it for market, buildings called "breakers" are erected, and in these buildings the large lumps are broken and the coal separated into required sizes by being run over a series of screens of appropriate mesh. Some lump coal is taken as it comes out of the mine and is marketed for use either in furnaces or locomotives, but the demand for this size is limited. The sizes usually transported are the following:

27 Broken or grate, which goes through a mesh 4 inches square and over a mesh  $2\frac{3}{4}$  inches square.

Egg, which goes through a mesh  $2\frac{3}{4}$  inches square and over a mesh 2 inches square.

Stove, which goes through a mesh 2 inches square and over a mesh  $1\frac{3}{8}$  inches square.

Chestnut, which goes through a mesh  $1\frac{3}{8}$  inches square and over a mesh three-fourths inch square.

Pea, which goes through a mesh three-fourths inch square and over a mesh one-fourth inch square.

Buckwheat No. 1, which goes through a mesh one-half inch square and over a mesh one-fourth inch square.

Buckwheat No. 2, or rice, which goes through a mesh one-fourth inch square and over a mesh one-eighth inch square.

Smaller sizes are known as buckwheat No. 3 and culm.

The sizes above pea are known as prepared sizes and are used principally for domestic purposes. The smaller sizes are used almost entirely for steam purposes.

Formerly the smaller sizes had no commercial value and were allowed to accumulate as waste product in banks at the mines. By changes made in the grates of furnaces have facilitated their use for steam purposes, and such use has been increasing rapidly during recent years. By means of "washeries" large quantities of the smaller sizes have been recovered from these waste or culm banks and sent to market to satisfy this increased demand. However, on comparatively small prices can be obtained for these smaller sizes.

The cars are loaded directly from the breakers by means of chutes. The loaded cars are then hauled to a convenient place of concentration along the main track, designated a gathering or assembling point, where they are drilled into trains according to destination and with some reference to the sizes. The coal destined to tidewater points is hauled in trains to yards adjacent to the docks, where a more particular separation takes place; that is, say, coal of particular qualities and sizes is placed on separate tracks and afterwards transferred to the boats or storage bins in accordance with the requirements of different purchasers.

For the year ended June 30, 1908, the Lehigh Valley Railroad Company carried altogether 11,206,774 gross tons of anthracite coal upon which its gross revenue was \$14,908,923.08, showing an average revenue of \$1.24.11 per gross ton, or \$0.00737 per net ton per mile. During the same period the Lehigh Valley's entire freight revenue amounted to 23,643,001 gross tons, its gross revenue \$30,186,581.72, its average rate per gross ton to \$1.277, and its average rate per net ton per mile on all traffic, including anthracite coal, to \$0.00630. It will thus be seen that during 1908 anthracite coal constituted approximately 47 per cent. of defendant's freight tonnage and produced approximately 49 per cent. of its freight revenue. Complainants shipped, between August 1, 1901, and June 30, 1907, 499,901.47 gross tons of anthracite coal, upon which they paid total freight charges of \$709,637.67, resulting in an average rate per net ton per mile (based on the average mileage from the Wyoming region to Perth Amboy of 170 miles) of \$0.00745.

It appears that prior to 1900 various anthracite coal carrying railroads in Pennsylvania, in their endeavor to control the output and sale of anthracite coal, had formed other and distinct corporate organizations, usually known as "coal companies," but which through stock ownership were owned, officered and controlled



the railroads which brought them into existence. Such was the relation that existed between the Lehigh Valley Railroad Company and the Lehigh Valley Coal Company. The function of the Lehigh

Valley Coal Company was to acquire, hold and operate vast  
29 tracts of anthracite coal lands, and to make contracts with independent operators for their entire output. In connection with the purchase of coal from independent operators there came into existence what are known as "percentage contracts." The Lehigh Valley Coal Company regularly for a period of years entered into such contracts with independent coal operators along the line of the Lehigh Valley Railroad. Under these percentage contracts the Lehigh Valley Coal Company agreed to pay the independent operators fluctuating prices for their coal at the mines, to be arrived at on the basis of certain percentages of the average market prices of the various grades of anthracite coal at tidewater. An accurate check was kept on the tidewater market prices, and monthly settlements were made. Under the contract which was in effect during the greater part of the year 1900, the agreement by the Lehigh Valley Coal Company was to pay the coal operator 60 per cent. of the tidewater price on the highest grade of anthracite coal and lesser percentages on the lower grades. This contract was therefore called the "60-per-cent. contract," due to the fact that that percentage figure applied on the highest grade of coal.

Although the Lehigh Valley Railroad Co. was not nominally a party to any of the percentage contracts entered into by the Lehigh Valley Coal Company, yet it made a practice of settling for the freight charges on coal purchased and shipped by the Lehigh Valley Coal Company at the differences between the amounts paid to the coal operators and the average market prices at tidewater. The result therefore was, taking the highest grade of coal as an illustration, that if the Lehigh Valley Coal Company paid the independent operator 60 per cent. of the tidewater price, the Lehigh Valley Railroad Company transported the coal for 40 per cent. of said tidewater price. It will thus be seen that, although the matter of  
freight rates was not mentioned in the contracts made by  
30 the Lehigh Valley Coal Company with the independent operators, yet the freight rates were directly dependent upon said contracts.

It appears that if an independent coal operator lacked established business connections or capital, it was to his interest to enter into the percentage contract with the Lehigh Valley Coal Company. Meeker & Company, however, had been in business as sales agents for coal since 1889, and their facilities for selling were adequate. They therefore made a contract with the Stevens Coal Company for practically their entire output of coal. There were also a number of other shippers of anthracite coal over the lines of the Lehigh Valley Railroad, and in order to place them on an equality with the Lehigh Valley Coal Company, they were accorded the same rates as were accorded to that company.

It was the custom for all shippers, including the Lehigh Valley Coal Company, to pay the tariff rates on the various grades of an-

thracite to tidewater, and then by means of monthly settlements be given the benefit of the rates upon the percentage basis, which rates were known as "adjusted rates," and were usually considerably lower than the tariff rates; but which at certain periods, owing to advancing prices of anthracite coal, were higher than the tariff rates. The general purpose of the adjusted rates was, however, to give the shippers the benefit of rates lower than the tariff rates, and, upon the whole, they accomplished this result, and the evidence shows that they were impartially applied on all shipments during the greater part of the time that they were in effect.

In November, 1900, the parties interested (i. e., the Lehigh Valley Railroad Company, the Lehigh Valley Coal Company and the coal producers) began to consider making a change in the terms of the then existing 60-per-cent. contract. It seems that the subject  
31 was not of easy solution, and that the negotiations dragged along for nine months, until August 1, 1901, at which time an agreement was reached whereby the price of the highest grade of coal at the breakers was to be 65 per cent. of the tidewater market prices, instead of 60 per cent. as formerly, with related increases on the lower grades. From almost the beginning of these negotiations, it seems to have been the understanding of all parties that whatever arrangement was finally reached would be made retroactive until November 1, 1900, the date of the beginning of the negotiations, and that the Lehigh Valley Railroad Company would readjust its freight charges retroactively in conformity with the new scale of prices not only upon shipments made by the Lehigh Valley Coal Company, but upon all coal shipped by independent dealers.

On the first hearing of this case counsel for the Lehigh Valley Railroad Company took the position that the tariff rates had been paid by all coal shippers during the nine months of negotiations; and that when, on August 1, 1901, it was determined that the 65-per-cent. basis should govern retroactively to November 1, 1900, the extra cost of the coal on this basis was paid by the Lehigh Valley Coal Company to the coal operators. Hence it was argued that the Lehigh Valley Railroad Company, having charged its full tariff rates to all, and the coal company having paid the increased price, there had been no discrimination against Meeker & Company during said nine months. As the evidence in support of this argument was meager and unsatisfactory, a supplemental hearing was had at which additional evidence was asked upon this point. The facts as disclosed by that hearing were as follows:

The Lehigh Valley Railroad Company during the period from November 1, 1900, to August 1, 1901, endeavored to settle with all shippers upon the basis of adjusted rates, under the 60 per cent. contract. During the months of November, December, January,

February and March the adjusted rates upon some of the  
32 grades were higher than the tariff rates, owing to the high market price of coal at tidewater. Meeker & Company were expecting the 65-per-cent. contract to be adopted, and believed that the effect of its adoption would be that they would get the benefit of

adjusted rates which were lower than the tariff rates, whereas under the 60-per-cent. contract, they were being called on to pay adjusted rates which were in many instances higher than the tariff rates. They protested against paying money to the Lehigh Valley Railroad Company under the 60-per-cent. basis, which they expected to be subsequently refunded when the 65-per-cent. contract was adopted. They therefore objected to settling upon the basis of the 60-per-cent. "adjusted rates," even as early as November and December, 1900, but under some arrangement or understanding with the coal freight agent of the Lehigh Valley Railroad Company, settlements were made for November and December, in order that the books of that company might be closed for the year. Thereafter they refused to settle upon the basis of the 60-per-cent. adjusted rates, even in those instances where settlement would have involved a refund to them from the tariff rate which they had paid. Their idea seems to have been to have nothing whatever to do with settlements upon the 60-per-cent. basis, because they believed the whole matter would have to be subsequently undone and refigured upon the 65-per-cent. basis.

During the earlier months of 1901, owing to the market prices of coal, the adjusted rates upon the 60-per-cent. basis were in the main higher than the tariff rates; but in April, May and June, and possibly thereafter, owing to the lower prices of coal, the adjusted rates became less than the tariff rates. The evidence does not clearly show whether independent shippers, other than Meeker & Company, paid the adjusted rates, when they were higher than the tariff rates, but the presumption is that some of them at least  
33 did so. It appears, however, that shippers other than Meeker & Company accepted refunds from the Lehigh Valley Railroad Company, in such instances as the adjusted rates were lower than the tariff rates.

When it was finally determined, on August 1, 1901, to adopt the 65-per cent. contract, the Lehigh Valley Railroad Company made a systematic effort to pay back to all shippers, including the Lehigh Valley Coal Company, such amounts as may have been paid during the period November 1, 1900, to August 1, 1901, in excess of the tariff rates. There was not, however, at that time any attempt made to collect back from shippers refunds which may have been made to them from month to month when the "adjusted rates" were lower than the tariff rates. It thus appears that the attempted readjustment to basis of tariff rates which the Lehigh Valley Railroad Company sought to make upon the adoption of the 65-per-cent. contract was only partial. Meeker & Company were offered refunds of the excess over tariff rates which had been paid in November and December, 1900, but refused to accept the same, stating in a letter of refusal that they would insist upon settlement of freight rates upon the basis of the newly adopted 65-per-cent. contract.

This brings us to the contention of complainants that the payment of the increased retroactive prices to the coal producers by the Lehigh Valley Coal Company was in fact a payment by the Lehigh Valley Railroad Company, and therefore equivalent to a

readjustment by the latter company of its freight rates upon the basis of the 65-per-cent. contract on such coal as was shipped by the Lehigh Valley Coal Company during the period from November 1, 1900, to August 1, 1901.

Investigation of the books of the Lehigh Valley Railroad Company disclosed the fact that subsequent to August 1, 1901, there were extraordinary cash advances made by that company  
 34 to the Lehigh Valley Coal Company, and one of the purposes of the supplemental hearing was to ascertain whether said cash advances included the sum which the Lehigh Valley Coal Company paid to the coal operators under the 65-per-cent. contract which was made retroactive for the nine months from November 1, 1900, to August 1, 1901.

On that hearing it developed that at the end of the year November 30, 1898, the Lehigh Valley Coal Company owed the Lehigh Valley Railroad Company \$1,596,650; that at the end of the year November 30, 1899, the amount of its indebtedness remained unchanged; that during the fiscal year November 30, 1899, to November 30, 1900, there was a strike, production was curtailed and sales were made from stored coal, whereby the coal company was enabled to reduce its stock of coal, and its accounts receivable due from customers for coal sold; that as the result of this condition the indebtedness of the coal company to the railroad company, on November 30, 1900, had been reduced to about \$500,000. The unusual advances made by the railroad company to the coal company in 1901 were necessitated by the resumption of mining operations after the cessation of the strike. Counsel for the Lehigh Valley Railroad Company introduced in evidence the following extracts from the annual report of the company to its stockholders for 1901, viz:

Under the existing arrangements, the Lehigh Valley Coal Company is compelled to depend upon the railroad company for working capital to carry on its operations.

\* \* \* \* \*

The suspension of mining during the period of the strike last year and the sale of the greater portion of coal in stock enabled the coal company to repay to the railroad company a large proportion of the amount advanced by the latter company for this purpose.

35 And counsel for complainant was permitted to read into the record the following additional extract from the same report, viz:

The uninterrupted continuance of operations during the fiscal year just closed (i. e., the year ending November 30, 1901) restored normal conditions, necessitating advances by the railroad company of a million dollars, which amount is more than represented by the increased tonnage and value of the coal in stock as compared with November 1st last.

The general auditor of the Lehigh Valley Railroad Company testified that the amount which the Lehigh Valley Coal Company had to pay the coal operators under the 65-per-cent. contract, which on August 1, 1901, became effective retroactively to November 1, 1900, was \$231,090.19. He further testified that the deficit of \$491,576.65

shown in the operations of the Lehigh Valley Coal Company for the year ended November 30, 1901, would have been less by \$231,090.19 had it not been for the payment by the coal company to the operators of the increased prices under the retroactive 65-per-cent. contract.

In view of the admissions upon the supplemental hearing the conclusion seems inevitable that the financial condition of the Lehigh Valley Coal Company was not such as to have enabled it to pay the \$231,090.19 to the coal operators out of its own treasury, and that not only this amount, but much larger sums, were advanced by the railroad company to the coal company during the year 1901 for the purpose of enabling the latter to carry on its operations.

It is alleged in the petition that between November 1, 1900, and August 1, 1901, complainants, Meeker & Company, shipped 88,336 tons of coal from the Wyoming region to tidewater at Perth Amboy, N. J., a distance of about 165 miles, on which they paid a sum total as freight charges, amounting to \$129,989.18; whereas upon the 35-per cent. basis which complainants contend was the necessary result of the 65-per cent. contract entered into by the Lehigh Valley Coal Company on August 1, 1901, the freight charges should have been only \$118,867.21, the amount of overpayment by complainants being \$11,121.97.

From the facts disclosed it is apparent that the payment of the \$231,090.19, which was ostensibly made by the Lehigh Valley Coal Company to the coal operators from which it had purchased coal during the period from November 1, 1900, to August 1, 1901, was in fact made from funds advanced as cash by the Lehigh Valley Railroad Company to the Lehigh Valley Coal Company, and was therefore the equivalent of a readjustment of the freight rates upon the basis of the 65-per-cent. contract on such coal as was purchased by the Lehigh Valley Coal Company and shipped to tidewater during the period from November 1, 1900, to August 1, 1901. We are of the opinion and so hold that complainants have sustained the allegation of unjust discrimination under the second section of the act. Reparation, with interest from August 1, 1901, will be awarded on this account.

Since August 1, 1901, complainants and other shippers have paid full tariff rates on coal from the Wyoming region to Perth Amboy, which rates are as follows:

	Per gross ton
Prepared sizes .....	\$1.55
Pea coal .....	1.40
Buckwheat coal .....	1.20
Aug. 7, 1904, to Jan. 10, 1905 .....	1.25
All sizes below buckwheat .....	1.10

It is alleged in the complaint that any charge in excess of \$1 on all grades subsequent to August 1, 1901, is unreasonable, and reparation is asked by complainants, upon the basis of the suggested rate of \$1, upon all shipments made by them over the Lehigh Valley Rail-

- 37 road during the period August 1, 1901, to July 1, 1907, the aggregate amount of reparation sought during said period being \$210,351.

In a later complaint, filed April 13, 1910, No. 3235, styled Henry E. Meeker vs. Lehigh Valley Railroad Company, complainant seeks reparation on the basis of a rate of \$1 on all grades of coal shipped during the period July 1, 1907, to April 1, 1910, alleging a total overcharge during said period of \$55,290.73.

As the subject-matter of the two complaints is the same, in so far as the reasonableness of the rates is concerned, the disposition of the later case will perhaps be determined by the conclusions reached in this case.

When complainants filed their complaint in July, 1907, they elected as to the period from November 1, 1900, to August 1, 1901, to rely entirely upon a violation of the second section of the act, and therefore claimed reparation only to the extent of \$11,121.97, on the ground of discrimination during said period in favor of the Lehigh Valley Coal Company, claiming that the effect of the retroactive 65-per-cent. contract of August 1, 1901, was to readjust upon a lower basis the freight rates which had been paid by the Lehigh Valley Coal Company during said period.

When the case came on for hearing in March, 1909, complainants' counsel announced orally before the Commission, and not by way of amendment of their petition, that they desired to claim additional reparation in the sum of \$41,644.82—the excess paid over \$1 per ton, during the period from November 1, 1900, to August 1, 1901.

Complainants' counsel stated in his brief filed with the Commission, but not by way of amendment to his petition, that by reason of the fact that the Commission may not be convinced that \$1 per ton is a reasonable rate on all grades of coal to tidewater, he desired to put his claim for reparation in an alternative form, viz: That  
38 in event the Commission should not approve the suggested rate of \$1 per ton on all grades of coal, complainants are entitled to reparation in the amount of \$156,144.92, the amount by which the freight charges which they have paid exceed what said charges would have been upon the basis of the average rate per ton per mile on all freight transported by the Lehigh Valley Railroad Company. In support of this claim for reparation, he sets forth an exhibit in his brief, which covers the calendar years 1902 to 1907, inclusive. This claim, therefore, does not extend back to November 1, 1900, as do his other claims; but it includes the latter half of 1907, and therefore extends six months beyond the period covered by his larger claim for reparation on the basis of the proposed \$1 rate.

Complainants insist that the average rate per ton per mile upon coal ought not to exceed the average rate per ton per mile upon all freight traffic, and base their claim for reparation in large part upon the assumption that the higher rate per ton-mile on coal is proof of the unreasonableness of the rates in question. Defendant answers this contention by asserting that the initial service in connection with the transportation of coal, commonly called collection or



assembly, and the terminal service at Perth Amboy, are both difficult and complicated, and involve extraordinary operating expenses, as well as the permanent investment of a large amount of capital, which are not incurred in the transportation of other classes of freight. The transportation of coal from the mining regions to Perth Amboy is described in detail in the record and may be summarized as follows:

Coal from the Wyoming region around Wilkes-Barre, after being assembled from the various branches, is carried east by way of Coxton or Pittston Junction over what is known as the Mountain Cut-Off, thence by way of Avoca, Penn Haven Junction and Phillipsburg to South Plainfield, where it leaves the main line for Perth Amboy. Coal from the Lehigh region is collected from the various branches in the neighborhood of Hazleton, Lumber Yard, New Boston and Mount Carmel, and carried to Penn Haven Junction, from which point it follows the same course as the Wyoming coal. Coal from the Schuylkill region reaches the main line at Lizard Creek Junction from the regions around Blackwood. Coal in transit from the Wyoming region to Perth Amboy passes over defendant's Wyoming and New Jersey & Lehigh divisions. The Wyoming division extends from Sayre to Mauch Chunk, and includes the territory known as the Wyoming coal region, or the southern part of the northern coal field, and touches also the Lackawanna coal region. The New Jersey & Lehigh division extends from Easton to the sea end of the Perth Amboy docks. Defendant's Mahanoy & Hazleton division covers a portion of the Lehigh and a portion of the Schuylkill regions in the middle and southern coal fields. This division meets the main line at Penn Haven Junction.

Coal is brought from the colliers to assembly yards, from which it is in turn taken to classification yards, where trains are made up for the main-line hauls. In the Wyoming division there are two such yards, Port Bowkley and Coxton, the former being an assembly yard and the latter both a classification and assembly yard.

At Perth Amboy defendant has adequate terminal facilities, storage bins, two docks and appropriate equipment for the handling of anthracite coal. Ten locomotives and crews are employed by the company in handling coal at the terminal. At the entrance to the terminal are a series of tracks, eight in number, about one-half mile long, known as the receiving tracks, upon which trainloads of coal are left by the road crews. Upon these tracks employees inspect and check the cars and designate by marks thereon the various kinds and sizes of coal, region and colliery from which shipped, and such other information as may be necessary for proper unloading into vessels or storage bins. After the cars are so marked they are classified for purposes of disposition. When orders are received the coal is removed to the docks or stocking bins, both of which are provided with suitable trackage facilities.

Complainants' contention that the rates to Perth Amboy are unreasonable is based in part upon the testimony of certain persons who were formerly officers of the Delaware, Susquehanna & Schuyl-



kill Railroad and of Coxe Brothers & Company. For many years prior to 1905, Coxe Brothers & Company were engaged in mining and shipping anthracite coal from their extensive properties in the Lehigh region. They owned and operated the Delaware, Susquehanna & Schuylkill Railroad, a road about 28 miles in length, which reached their different collieries and connected with the Lehigh Valley Railroad at a place called Lumberyard or Stockton Junction.

After January, 1894, the Coxe coal, instead of being carried to Perth Amboy in the trains of the Lehigh Valley, was transported to tidewater in the trains of the Delaware, Susquehanna & Schuylkill Railroad, and by its motive power, under a trackage contract between that road and the Lehigh Valley, which provided for the use of the tracks of the latter company from Stockton Junction to Perth Amboy, a distance of approximately 125 miles. The agreed compensation to the Lehigh Valley for the use of its tracks was 2 7/8 mills per gross ton per mile, or 35.94 cents per gross ton for the haul from Stockton Junction to Perth Amboy. The Lehigh Valley unloaded the coal at Perth Amboy into vessels or bins and performed other terminal service, for which it charged Coxe Brothers 12 cents per ton. Additional payments were agreed upon from time to time for other services by the Lehigh Valley, such as supplying additional motive power to push trains over grades, furnishing coal to Delaware, Susquehanna & Schuylkill locomotives, repairing cars at Perth Amboy and similar incidentals.

41 The contract of January, 1894, remained in force until April, 1904, when it was replaced by another contract, substantially similar in all material respects and providing for the same compensation to the Lehigh Valley and which was to have remained in effect for a period of 15 years. It remained in effect, however, only until 1905, when the Coxe properties were purchased by the Lehigh Valley Railroad.

During the period prior to the absorption of the Delaware, Susquehanna & Schuylkill Railroad by the Lehigh Valley Railroad Company, L. C. Smith, manager of the Delaware, Susquehanna & Schuylkill Railroad Company, and J. H. Pennington, superintendent of motive power of said railroad, and J. Brinton White, vice president and treasurer of Coxe Brothers & Company, made certain calculations as to the cost of the Delaware, Susquehanna & Schuylkill Railroad of transporting anthracite coal to Perth Amboy, based on various elements of operating expense, including the aforementioned trackage charge of the Lehigh Valley Railroad.

Counsel for complainants has introduced the testimony of these three men relative to the cost of transporting coal from the Lehigh region; and insists that it has an important bearing on the cost of transporting coal from the Wyoming region, for the reason that it has been the custom of the Lehigh Valley Railroad Company to make the same rates from the Wyoming region to Perth Amboy as from the Lehigh region to Perth Amboy; and also because the Wyoming region has the advantage over the Lehigh region, both in distance and in grades.

L. C. Smith, former manager of the Delaware, Susquehanna &

Schuylkill Railroad, testified that about 1900, he, as manager of the Delaware, Susquehanna & Schuylkill Railroad, made up a statement of cost to move one train of coal from Drifton, a mine of

42 Coxe Brothers & Company, to Perth Amboy, including trackage to the Lehigh Valley Railroad Company, the shipping charges of that company at Perth Amboy, and the return of empty cars, which statement is filed as Complainants' Exhibit No. 1.

The total cost per ton shown by said exhibit is 76.54 cents.

J. Brinton White, vice president and treasurer of Coxe Brothers & Company, who owned the entire stock of the Delaware, Susquehanna & Schuylkill Railroad Company, made frequent calculations as to the cost per ton of the movement of coal from the mines on the Delaware, Susquehanna & Schuylkill Railroad to Perth Amboy, and continued these calculations until he "got down to a figure which he knew to be correct." The figure which Mr. White arrived at was 76 cents per ton; but as this 76 cents included the trackage charge of the Lehigh Valley Railroad and the shipping charges at Perth Amboy, he was of opinion that the profit of the Lehigh Valley should have been deducted from the 76 cents, if the profit could have been ascertained.

J. H. Pennington was superintendent of motive power of the Delaware, Susquehanna & Schuylkill Railroad Company from 1899 until the latter part of 1905, when that road was bought by the Lehigh Valley Railroad Company, and he made certain tests for the purpose of determining the relative cost of transporting coal from Delaware, Susquehanna & Schuylkill Railroad mines to Perth Amboy in 60,000 and 100,000 pound capacity cars, respectively.

Based upon his tests for the cars of 100,000 pounds capacity (which it is claimed are now in use), counsel for complainants claims to show that the cost of transporting a ton of coal from the mines of the Delaware, Susquehanna & Schuylkill Railroad to and including the dumping of the cars at Perth Amboy, and the return of the empty cars to the colliery, amounted to 62.41 cents; which

43 figure includes the profit of the Lehigh Valley Railroad Company on its trackage charge and the profit on the shipping expenses of 12 cents at Perth Amboy.

Counsel for the Lehigh Valley Railroad Company, in his brief, enters upon an exhaustive criticism of Complainants' Exhibit No. 1. Among other things he says:

The exhibit includes no allowance for assembling; it contains no allowance for reserve equipment; it contains no allowance for depreciation; no allowance is made for overtime of crew; no allowance is made for non-revenue haul; no allowance is made for loss and damage or injuries to persons; the item shown for fuel is manifestly inadequate; the wages allowed are inadequate.

He also argues that as the estimate of J. Brinton White confirms that of Mr. Smith, the presumption is that Mr. White omitted the same items that were omitted by Mr. Smith.

As to J. H. Pennington's estimate of the cost per gross ton of transporting coal to Perth Amboy, counsel for the Lehigh Valley Railroad Company says that he admitted that in making the test

he purposely left out of account such expenses as would be substantially the same, whether he used 60,000-pound cars or 100,000-pound cars. He did not take into account the following:

- Reserve engines.
- Maintenance and repairs of locomotives.
- Repairs to cars.
- Expenses of telephone and telegraph.
- Stationery.
- Clerks.
- General office expenses.
- Yard expenses.
- Terminal expenses.
- Loss and damage claims.
- Clearing wrecks, etc.

It will be noted that in the calculations made by L. C. Smith and J. Brinton White, one of the most important items was the trackage charge of 35.94 cents per gross ton, which the Lehigh Valley Railroad Company charged the Delaware, Susquehanna & Schuylkill Railroad for the use of its tracks for the 125-mile haul from Stockton Junction to Perth Amboy.

As it did not clearly appear from the record what the conditions were that led to the trackage arrangement, further testimony was taken upon that point at the supplemental hearing. It was shown that prior to the trackage contract entered into by the Delaware, Susquehanna & Schuylkill Railroad Company with the Lehigh Valley Railroad Company, the coal traffic originating on the Delaware, Susquehanna & Schuylkill Railroad had moved to tide water over the lines of the Philadelphia & Reading Railroad. The following extract from the annual report of the Philadelphia & Reading Railroad Company for the year ended November 30, 1893, was read into the record:

A contract was made with Coxe Brothers & Company, under date of May 14, 1891, for the transportation over the Reading Railroad System of a large tonnage of coal from the mines of that company to New York tidewater and to other markets, the minimum amount to be 1,000,000 tons per annum.

In order to transport the coal to be furnished under this contract, a railroad 10 miles in length was constructed by the Reading Company to connect its lines with those of the Delaware, Susquehanna & Schuylkill Railroad, which was controlled by Coxe Brothers & Company, and a large coal tonnage had passed and was passing over this road; but the division of the freight rate as between the two railroad companies was felt by the receivers to be so inequitable to the Reading Company, as on the greater part of the tonnage it allowed the Delaware, Susquehanna & Schuylkill Railroad Company an average of about 73 cents per ton for gathering the coal, hauling it an average of about 12 miles to Roan Junction, and shipping it at Port Johnston, leaving for the Reading Company only 80 cents per ton for hauling the coal 168 miles to Bound Brook Junction, that they notified Coxe Brothers & Company that after August 15, 1893, they would no longer trans-

port their coal under that contract, offering, however, to continue to carry the coal upon terms similar to those which are ordinarily accorded to other railroad companies for the exchange of similar business. This offer was, however, not found satisfactory by Coxe Brothers & Company, and the transportation of their coal has, therefore, been almost entirely lost to the Reading Company.

The following extract from the annual report of the Lehigh Valley Railroad Company to its stockholders, for 1894, was also read into the record:

On January 31, 1894, a contract was entered into with the Delaware, Susquehanna & Schuylkill Railroad Company, whereby that company was granted the privilege of running its own trains coal laden to the tidewaters of New York, thus assuring to this company for a term of 15 years from July 1, 1894, an important traffic, that of the Cross Creek Coal Company, formerly Coxe Brothers & Company, for which several outlets existed, and which had been in contention for some time previously. It also removed an incentive for the construction of new lines into the territory tributary to the Lehigh Valley System. Local coal received from the line of that company continues to be hauled in our trains as it was previously.

It appears that, when the contract with the Lehigh Valley Railroad Company was entered into, the Philadelphia & Reading Railroad Company tore up its 10-mile extension which it had built to connect with the Delaware, Susquehanna & Schuylkill, because there was no longer any use for it.

For the purpose of showing the effect of the trackage contract of January, 1894, upon the movement of anthracite coal over the Lehigh Valley Railroad, counsel for that company at the supplemental hearing, put in evidence the following exhibit, viz:

46 *Statement of Anthracite Coal Received from the Delaware, Susquehanna & Schuylkill Railroad During the Fiscal Years Ended November 30.*

Year.	Gross tons.	Year.	Gross tons.
1891.....	213,031	1894.....	976,415
1892.....	199,310	1895.....	1,053,965
1893.....	350,295	1896.....	1,115,077
Total.....	762,636	Total.....	3,145,457

It was also shown that the Central Railroad of New Jersey had a track into Drifton, a point located on the Delaware, Susquehanna & Schuylkill Railroad, and that the Delaware, Susquehanna & Schuylkill Railroad also had a connection with the Pennsylvania at Tomhicken.

Defendant has endeavored to show the actual cost of transporting coal from the Wyoming district to the barges at Perth Amboy. Three civil engineers, William J. Wilgus, J. F. Stevens and John F. Wallace, were engaged by defendant to investigate the transportation of coal from the anthracite region to tidewater for the purpose of ascertaining the cost thereof. They were assisted in their inves-

tigation by officers and employees of the road and by engineers in Mr. Wilgus' office. Mr. Wilgus prepared an estimate of the cost of carrying coal based upon theories and formulae which were approved by the other engineers. His estimate is set forth in a voluminous exhibit known as "Defendant's Exhibit F-3." The exhibit contains all the details from which the final estimate of cost is deduced. The recapitulation of Exhibit F-3 is as follows:

47 *Cost of Transporting Anthracite Coal on the Lehigh Valley Railroad from the Wyoming District to Perth Amboy.*

Items.	Perth Amboy terminal.	Main line, Perth Amboy to Coxtown.	Wyoming collection district.	Total.
Operating expenses, including taxes.....	\$0.1189	\$0.6915	\$0.0866	\$0.897
Interest:				
Roadbed, tracks, and structures.....	.0700	.1470	.0412	.258
Equipment.....	.0096	.0437	.0283	.081
General facilities.....	.0012	.0046	.0010	.006
	.0808	.1952	.0705	.346
Depreciation:				
Roadbed, tracks, and structures.....	.0071	.0034	.0009	.0114
Equipment.....	.0080	.0046	.0176	.0302
General facilities.....	.0004	.0015	.0003	.0022
	.0155	.0095	.0188	.0438
Total.....	.2152	.9562		1.347
Additions and betterments.....				.0406
Risks and deficits.....				.1070
Grand total.....				1.4943

There are many circumstances, however, connected with the preparation of this exhibit, which seriously impair its value as evidence on the question of cost.

Mr. Wilgus testified that the figures which he used in preparing said exhibit as to the value of the roadbed, track and structures, and value of equipment, were based on an examination of the road and an examination of the equipment, and that he had attempted to estimate the cost of reproduction. This work, he states, was done by himself and assistants in his employ. The assistant in his employ who undertook to make an examination of the road with a view to determining the cost of reproduction was T. A. Lang and Mr. Wilgus testified that his calculations are absolutely dependent upon the information furnished him by Lang.

The story of Mr. Lang's investigation as to cost of reproduction, as told by Lang himself, was as follows:

48 He left Perth Amboy at 1.20 P. M. on a passenger train for Easton, arriving there about 3.20 or 3.30 P. M. In going to Easton he stood on the rear platform of the train. After arriving at Easton, he did nothing more that day, as it was Sunday. The following morning at 9 A. M. he left Easton on a pony engine, which had a coach on top of the boiler. On this engine he traveled at the

rate of 15 or 20 miles an hour, stopping at various points. About 5.30 P. M., of the same day, he arrived at Wilkes-Barre and stayed there all night, all the next day and the next night. While there he made computations in the railroad company's office. On the following day he left Wilkes-Barre at 8.30 A. M. on a passenger train and arrived at Easton about 11 or 12 o'clock. He remained in Easton until that afternoon, and then took a train for New York. While at Easton he devoted a "few minutes" to an examination of the Delaware bridge and the Easton steel viaduct. Based upon this examination, he furnished Mr. Wilgus the data which he required as to estimated cost of reproduction of the Lehigh Valley Railroad.

This examination by Lang was made in the latter part of April, 1909. Mr. Wilgus accepted his estimates, and gave his testimony on April 29, 1909. Mr. Lang, however, was not called as a witness until May 25, 1909. Evidently feeling that his first superficial examination of the road would become the subject of attack, he undertook early in May to make a more thorough examination of the road.

On this second trip he consumed eight and one-half days going over the road on a hand car, and the results of his work on the second trip he terms "his check estimate." The cross-examination of Mr. Lang developed that his check estimate was also a very superficial piece of work. He testified that he "could see" the thickness of the ballast "very easily," and that he measured it "at one place"

only; that it was from 18 to 20 inches in thickness. He also  
49 testified that he started out to count the number of switches and frogs, but did not carry it all the way through. He further says that there never had been any examination of the ties and ballast or going over the road in a hand car at the time that Mr. Wilgus made his estimate.

Based upon information thus furnished, Mr. Wilgus undertook to determine the cost of carrying a ton of coal from the Wyoming district to Perth Amboy, and Messrs. Wallace and Stevens were called as witnesses to confirm the reliability of his figures.

Mr. Wilgus testified that on the trip which he made over the Lehigh Valley Railroad, he started from New York at 6 P. M. in an observation car with Messrs. Wallace and Stevens and certain officials of the Lehigh Valley Railroad Company, and went to Wilkes-Barre. The two following days were spent in riding over the main line of the Lehigh Valley Railroad and some of its branches. It appears never to have been the intention that Messrs. Wilgus, Wallace or Stevens should personally do any of the detail work incidental to the determination of the cost of carrying coal to Perth Amboy. All of that was to be done for them by subordinates, and they were then to testify whether they believed the works of these subordinates constituted a conservative estimate of the cost.

Mr. Stevens testified in substance that he believed it possible for a competent engineer to get a correct approximate idea of the value of a railroad by riding over it, and that he has done considerable work in estimating values by traveling over railroads. He stated



that he was not prepared to dispute Mr. Wilgus' figures, and that he would not guarantee them; and "that it would be worse than foolish for him to say that he had time to undertake to make a mile-by-mile estimate of the cost of reproducing the Lehigh Valley Railroad." The most that he had to say concerning Mr. Wilgus' estimate was that it was "probably conservative."

50 Mr. Wallace frankly admitted that his testimony given in corroboration of Mr. Wilgus' figures was a matter of pure personal judgment, based on his experience and observation. He testified that men in his line of business were continually drawing comparisons and making "estimated judgments," and that sometimes they were correct and sometimes wrong. He further stated that it was his custom to value railroad property very much as a farmer would value a horse.

The estimate of cost made by Mr. Wilgus is based on the fundamental assumption that the cost of carrying coal is equal to the average cost of carrying all traffic. If this proposition be sound, it follows that by far the greater part of tariffs covering the transportation of coal are improperly constructed, for the rates upon coal are generally much below the average rates.

Again, as a basis of apportioning expenses for which no actual division could be obtained, the engineers used the relation of passenger-train ton-mileage to freight-train ton-mileage, finding that of the total the former was 7.8 per cent. and the latter 92.2 per cent. This arbitrary basis of apportionment seems to be unwarranted when we take into consideration the relation which exists between freight revenue and passenger-train revenue on the Lehigh Valley Railroad. Those revenues were as follows for the years shown:

	1901.	1905.	1908.	1910.
Total freight revenue.....	\$19,829,363	\$25,962,920	\$30,186,582	\$30,579,000
Passenger-train revenue.....	3,460,528	4,116,847	4,842,652	5,097,000

It thus appears that upon the basis of relative earnings at least 14 per cent. of the value of the road could properly have been assigned to passenger traffic, whereas in the estimate made by Mr. Wilgus but 7.8 per cent. has been so assigned.

Moreover, it will be noted that the estimate of cost shows that the average cost of carrying anthracite coal from the Wyoming region to Perth Amboy is \$1.49. An exhibit filed by the Lehigh Valley shows that its average receipts per gross ton of anthracite coal to Perth Amboy for the 10 years ending June 30, 1908, were \$1.46. It would therefore follow that all anthracite coal which has been hauled by the Lehigh Valley to tidewater has been carried at a loss of about 3 cents per ton. But it is shown by reports on file with the Commission that the operations of the Lehigh Valley Railroad Company for a number of years past have been exceedingly profitable, and as anthracite coal has constituted almost half of its tonnage, it is fair to assume that it has made a profit upon the handling of that commodity.



There are other matters contained in the record which go to show that the cost of transporting coal as estimated by Mr. Wilgus is excessive.

Henry B. Ely, who was formerly general eastern agent for Coxe Brothers & Company, testified that after the decision in the case of Coxe Brothers & Co. vs. Lehigh Valley Railroad Company, 4 I. C. C. Rep., 535, in 1891, and up to the 31st of January, 1894, the rates paid by Coxe Brothers & Company were the tariff rates of the Lehigh Valley, less a discount of 35 per cent. The tariff rates which were in effect during this period are contained in an exhibit filed by the Lehigh Valley, and deducting said discount therefrom, it appears that the rates actually charged Coxe Brothers & Company were as follows:

	Rate per ton.
For prepared sizes.....	\$1.10½
For pea coal.....	.91
For buckwheat and smaller sizes.....	.78

Defendant has also filed in evidence an exhibit, which shows the adjusted rates to Perth Amboy on the various grades of anthracite coal, by months, during the period from January, 1895, to October, 1900, inclusive, a period of five years and nine months, immediately preceding the discontinuance of adjustments upon the percentage basis. An average of the rates contained in said exhibit shows the following:

	Rate per ton.
Prepared sizes .....	\$1.4164
Pea coal .....	1.1712
Buckwheat .....	1.1566

These latter figures are of themselves sufficient to show that the estimated cost of carrying coal to tidewater of \$1.49 is far from correct.

A very noticeable feature of the work of these experts employed as disinterested parties to ascertain the cost of carrying coal to Perth Amboy is the manner in which they arrived at their valuations of real estate and rights of way.

Mr. Wilgus testified that he did not himself make the estimates upon the value of the Perth Amboy terminals, but took the estimates of his assistant, Mr. Van Houton. Mr. Van Houton testified that he got his information as to the cost of reproduction of the Perth Amboy terminals from the general solicitor of the defendant, because he is an authority on real estate and handles all the real estate matters for the Lehigh Valley Railroad. Mr. Wilgus also stated that he valued the right of way from Perth Amboy to South Plainfield Junction at \$3,000 an acre, and between Penn Haven and Phillipsburg at \$1,200 an acre, and that these estimates were made "not only upon the way it impressed me, but also from consultation with Mr. Schaperkotter, the general solicitor of the company."

Complainants have called attention to the rates of the Pennsylvania Railroad Company for the transportation of anthracite and the rates of certain bituminous carriers. The Pennsylvania Railroad Company carries anthracite coal from South Wilkes-Barre and

Plymouth, in the Wyoming region, to South Amboy, N. J. There are two routes by which the Pennsylvania may carry this coal, the longer route being 276 miles and the shorter 222 miles. Owing to the fact that the grades on the long haul are very much easier than those on the short haul, the long haul is the one generally used. Its rates for this transportation are as follows: Prepared sizes, \$1.40 per gross ton; pea coal, \$1.25 per gross ton; and buckwheat, \$1.15 per gross ton. Up to a comparatively recent date the same rates applied from points on the Delaware, Lackawanna & Western Railroad, which brought the coal to the Pennsylvania Railroad, and the Pennsylvania allowed the Lackawanna a 15-cent lateral charge. The Pennsylvania has since withdrawn the lateral allowance and requires payment to it of its full rate.

The Norfolk & Western Railway Company transports bituminous coal from Pocahontas to Lambert's Point, 377 miles, crossing the Blue Ridge and Allegheny Mountains, at a rate of \$1.40 per gross ton, and this includes the collection of the coal in the Pocahontas district and dumping the same into vessels at Lambert's Point. The rate per ton per mile for this haul is \$0.00377. In the Pocahontas district there are two assembling yards, Bluefield and Vivian, the average distance of the collieries from Bluefield being about 29 miles, and the average distance of the collieries from Vivian about 15 miles. During 1907 the Norfolk & Western collected from the 67 collieries in the district 7,285,360 tons of coal. During the same year the Lehigh Valley collected 4,142,442 tons from the 26 collieries connected with its tracks in the Wyoming region. The following exhibit shows certain rates for the transportation of bituminous coal, together with the length of haul and the rate per ton per mile:

54 *Statement Showing Origin, Destination, Transporting Railroad, Miles Hauled, Rate Charged, and Rate per Ton per Mile on Bituminous Coal Shipments to Tidewater.*

(2,240 Pounds per Ton. Rates Include Dumpage from Piers to Vessels.)

Region or district.	Transporting railroad.	Destination.	Miles hauled.	Rate charged.	Rate in cents per ton per mile.
Myerdale .....	Baltimore & Ohio .....	Baltimore .....	215.0	\$1.18	0.54
Do. ....	do. ....	Philadelphia .....	310.8	1.25	.40
Do. ....	do. ....	St. George .....	390.6	1.55	.39
Pocahontas .....	Norfolk & Western .....	Norfolk (Lambert's Point) ..	377.0	1.40	.37
New River Thurmond. ....	Chesapeake & Ohio .....	Newport News via Lynchburg ..	418.0	1.40	.33
Do. ....	do. ....	Newport News via Gordonville ..	381.0	1.40	.37
Kanawha Handley. ....	do. ....	Newport News via Lynchburg ..	457.0	1.50	.33
Do. ....	do. ....	Newport News via Gordonville ..	420.0	1.50	.37
Kentucky Marrowbone. ....	do. ....	Newport News via Lynchburg ..	673.0	1.70	.25
Do. ....	do. ....	Newport News via Gordonville ..	636.0	1.70	.27
Beech Creek .....	New York Central and Philadelphia & Reading. ....	Port Reading .....	308.0	1.55	.50
Do. ....	do. ....	Philadelphia (Port Richmond) ..	229.0	1.25	.54
Clearfield .....	Pennsylvania R. R. ....	Baltimore (Canton Pier) ....	242.2	1.18	.47
Do. ....	do. ....	South Amboy .....	322.5	1.55	.46
Do. ....	do. ....	Philadelphia (Greenwich pier) ..	252.2	1.25	.47
Do. ....	do. ....	Philadelphia via Lock Haven and Susbury. ....	317.0	1.25	.39

Defendant answers that the tidewater rate of the Pennsylvania Railroad, cited by the complainants, is entirely inconsistent with the other anthracite rates charged by the Pennsylvania, whereas the Lehigh Valley tidewater rate is in line and consistent with its other anthracite rates. An exhibit in this connection shows that the Pennsylvania Railroad Company's rate on prepared sizes to Harrisburg, a distance of 110 miles, is \$1.50; to Philadelphia, a distance of 164 miles, \$1.80; to Reading, a distance of 111 miles, \$1.80; to Perth Amboy, a distance of 226 miles, \$1.80; to South Amboy, when not for transshipment, \$1.80. The Pennsylvania Railroad Company is a bituminous rather than an anthracite road.

55 The defendant also introduced evidence tending to show that the market for anthracite coal on the lines of the Pennsylvania Railroad exhausts the supply originating on the road, and for this reason a 15-cent lateral was allowed on coal assembled on other roads and turned over to the Pennsylvania. On such shipments the Pennsylvania was relieved of the gathering cost; and in view of the high line rates on anthracite coal over the Pennsylvania, the arrangement was favorable to the railroad. As has been noted, the Pennsylvania has since withdrawn the lateral allowance.

In so far as the comparison with bituminous rates is concerned the defendant calls attention to the fact that bituminous rates are generally less than anthracite rates, due in part to the difference in value of the two kinds of coal, and that there are dissimilarities in connection with the carriage and shipment of bituminous and anthracite coal which render the transportation of anthracite coal more expensive. About 95 per cent. of the coal shipped from the bituminous regions is run of mine and no such elaborate classification is necessary in the assembling regions as in the anthracite region. Bituminous coal is not stored at tidewater and the carriers are therefore relieved of the expense of building storage bins and of placing the coal in the bins and removing it therefrom. It is also claimed that the carriage of bituminous coal involves less empty car mileage, but upon that point the record is rather indefinite. At any rate, the conditions relating to the transportation of anthracite and bituminous coal have not been shown to be similar to such a degree that the existence of a lower rate on bituminous would warrant a conclusion that a higher rate on anthracite on a different road is unreasonable.

It is earnestly contended that any such comparison disregards the fact that the Lehigh Valley Railroad was built and is maintained primarily as a coal-carrying road; that as such it has the right to receive a return upon the coal transported sufficient to enable it to operate profitably, and is further justified in obtaining all traffic that it can secure in addition to its anthracite tonnage at rates which exceed cost of operation; and that a successful search for such outside tonnage, so long as it is carried at a margin of profit above operating expenses, aids the road to perform more cheaply its service in gathering and carrying coal.

56 Defendant contends that the extraordinary terminal expense attributable to the comparatively short haul on anthracite coal makes any per-ton-per-mile comparison improper and misleading.

In connection with its terminal at Perth Amboy, defendant has erected 372 stocking or storage bins, which vary in capacity from 500 to 1,000 tons each, and have a total capacity of about 250,000 tons. Trestles extend over the stocking bins and coal is dropped into them from cars which have been pushed onto the trestles. Underneath the stocking bins are tunnels through which cars are run to remove the coal as called for. About 350 cars of 60,000 pounds capacity are employed exclusively in removing coal from the bins.

Attention is called by defendant to the special privileges accorded and services rendered in connection with the transportation of anthracite coal without extra compensation above the tidewater rates. The rate covers delivery of coal by the railroad into vessels at Perth Amboy. No demurrage is charged on cars at the collieries or at Perth Amboy. A slight deduction is made from the scale weights at the collieries to offset the weight of water in the coal when loaded, and an allowance is made for depreciation in weight due to re-handling. The shippers have the privilege of stocking in transit. Extensive storage privileges are permitted at Perth Amboy, the railroad providing the bins and performing the labor of storing and lifting from storage without additional compensation. This privilege tends to permit daily operation of mines to the limit of their

57 production regardless of the fluctuation of the market demand. Moreover, the demand for different sizes is more or less irregular, while the production of the several sizes is fairly uniform; and this condition makes the storage privilege of additional value to the shipper at certain seasons of the year. Complainants have freely exercised their privilege of storage. In 1907 they had 47.56 per cent. and in 1908 32.27 per cent. of the coal shipped by them to Perth Amboy placed in the bins. Of the coal tonnage carried to Perth Amboy in 1908, 20.96 per cent. was placed in the bins.

It is claimed that the limited life of anthracite railroads has an important bearing on the matter of freight rates, and is therefore a factor to be taken into consideration in connection with the question of "fair return".

As to the limited life of the anthracite railroads, counsel for defendant say in their brief:

The evidence establishes the fact that when the railroad shall be deprived of the tonnage from the collieries along its lines, and the incidental tonnage involved in and dependent upon the production of coal, the traffic on the Mahanoy and Hazleton Division and the Blackwood Branch will for all intents and purposes be nil.

As to the Wyoming Division, the investment in everything but the main line will have been destroyed, and the continued existence of the road will depend upon whether or not the through traffic is sufficient to pay the operating expenses and the interest charges.

There are many instances where, on account of closing up breakers for one reason or another, portions of the Lehigh Valley Railroad have already become useless.

They then cite the following instances of abandoned tracks in the Wyoming region, viz:

- 58 Crescent breaker, 1 mile long, abandoned 1900.  
 Babylon breaker,  $1\frac{1}{2}$  miles.  
 Lawrence track, partially abandoned, length not given.

Phoenix track, 1 mile long.

Heidelberg breaker, No. 2, tracks abandoned, length not given.

Henry breaker, tracks  $1\frac{1}{3}$  miles long, will soon be abandoned.

Wyoming breaker,  $\frac{1}{4}$  mile long.

Midvale track,  $\frac{1}{2}$  mile long, abandoned.

Franklin breaker,  $1\frac{1}{5}$  miles.

Abbott or Hillman mine,  $\frac{1}{3}$  mile long.

Mosier mine, track  $1\frac{9}{100}$  miles, abandoned.

Butler colliery, tracks taken up; length not given.

In addition, it is stated that many collieries have been abandoned which have not involved the taking up of tracks, the tracks remaining in partial use in connection with other breakers.

It will be noted that while the list of abandoned tracks in the Wyoming district has the appearance of being quite large, yet the sum total of such of the mileages as are specified shows that a fraction more than 8 miles have been abandoned.

Counsel also in their brief give quite a list of names of breakers which have been abandoned on the Mahanoy and Hazleton Division; but it is found that the total of abandoned mileage on this division is only 9.5 miles.

As to the kindred subject, namely, the exhaustion of anthracite coal supply, counsel in their brief thus state the result of the testimony of W. F. Dodge, an expert mining engineer, introduced as a witness on behalf of the defendant:

The total future shipments from the Wyoming Division, starting with the year 1909, will amount to 91,230,000 tons. The lives of the various collieries will vary from 5 to 50 years. The annual output is estimated for the first five years to be 19,395,000 tons, and will diminish gradually until, from the twenty-fifth to the thirtieth year, the annual output is estimated at only 7,055,000 tons, dwindling down in the period between the forty-fifth and fiftieth years to 50,000 tons per annum. At the end of 25 years, according to the testimony of Mr. Dodge, the output of the Wyoming region will be less than half what it is now, and at the end of 50 years will cease altogether.

On the other hand the following more optimistic view of the situation appears from the Report of the Anthracite Coal Strike Commission, rendered to the President of the United States, March 18, 1903, viz:

What is of some importance, however, in connection with the discussion of the past production is a consideration of what is to be expected in the future in the way of production and the probable duration of the anthracite coal supply. The original deposits of the anthracite coal field have been ascertained with a reasonable degree of accuracy.

According to the estimates of the Pennsylvania geological survey, the amount of workable anthracite coal originally in the ground was 19,500,000,000 tons. The production to the close of 1901, as

previously stated, amounted to 1,350,000,000 long tons, which would indicate that there remained still available a total of 18,150,000,000 tons. Unfortunately, however, for every ton of coal mined and marketed one and one-half tons, approximately, are either wasted or left in the ground as pillars for the protection of the workings, so that the actual yield of the beds is only about 40 per cent. of the contents. Upon this basis the exhaustion to date has amounted to 3,375,000,000 tons. Deducting from this the original deposits, the amount of anthracite remaining in the ground at the close of 1901 is found to be, approximately, 16,125,000,000. Upon the basis of 40 per cent. recovery, this would yield 6,450,000,000 long tons. The total production in 1901 was 60,242,560 long tons. If this rate of production were to continue steadily, the fields would become exhausted in just about one hundred years.

Mr. William Griffith, in a series of articles contributed to the Bond Record in 1896, considers that the estimates upon which the foregoing computations have been made were too liberal. His estimate of the amount of minable coal remaining at the close of 1895 was 5,073,786,750 tons.

In the six years from 1896 to 1901, inclusive, the production has been, approximately, 308,570,000 tons, which would leave still available for mining 4,765,216,750 tons. This supply, at the rate of production in 1901, would last a little less than 80 years. But as indicating how susceptible to error are human predictions, it is well to state that in his carefully prepared statement, published in 1896, Mr. Griffith assumes the limit of annual production would be reached in 1906 and would amount in that year to 60,000,000 tons.

This amount of production was reached in 1901, in just half the time predicted by Mr. Griffith, and the production of January, 1903, as recently reported, shows that the anthracite mines are capable of producing at a rate of 72,000,000 tons annually in their present state of development. It is not to be supposed, however, that the annual rate of anthracite production will continue practically uniform until the mines are exhausted and then suddenly cease. Portions of the fields have already been worked out, others are rapidly approaching total exhaustion, while others at the present rate of production will, it is calculated, last from 700 to 800 years. If we can assume the annual production will have reached its maximum limit at 61 between 60,000,000 and 75,000,000 tons, and that the production will then fall off gradually as it increased, we may expect anthracite mining to continue for a period of from 200 to 250 years. (Report of Anthracite Coal Strike Commission, pp. 21, 22.)

Defendant claims the right to earn enough out of its coal rates to provide for a return of the principal of the investment in that part of the railroad company devoted to the carriage of coal, when and as this principal becomes reduced and extinguished by exhaustion of the coal. We have noted the estimate of defendant's witnesses to the effect that shipments of anthracite coal over the railroad will practically cease in 50 years, and we have quoted the opinion ex-



pressed on the same subject by the Anthracite Coal Strike Commission to the effect that production may last for 250 years. Probably the truth lies somewhere between the two extremes. During the years 1903 to 1910, the Lehigh Valley Railroad Company under the rates in controversy succeeded in accumulating an unappropriated surplus of \$27,219,780. If the company could accumulate this sum for every eight-year period during the next 30 or 40 years, it would have a surplus in the neighborhood of \$125,000,000. It seems, therefore, that the present rates are more than sufficient to meet defendant's idea of an annual income sufficient to provide for return of the capital when that part of the railroad devoted to the carriage of anthracite coal loses its earning capacity through the exhaustion of that commodity. This matter, however, is too speculative to be of much value in determining the reasonableness of present rates. By the time anthracite coal is exhausted other traffic may have become so dense that the present value of the road will not be impaired.

It requires no extended argument to sustain the proposition that the maintenance of an unreasonably high rate operates to the advantage of the Lehigh Valley Railroad Company as a dealer  
62 in coal. The record shows that the only line of demarcation between the Lehigh Valley Railroad Company and the Lehigh Valley Coal Company is one of bookkeeping. Assuming for purposes of illustration that the cost of mining anthracite coal is \$2 per ton and the cost of carrying it to tidewater is \$1 per ton, it follows that the cost of coal at tidewater would be \$3 per ton; and if the published rate were \$1 the independent operator and the railroad coal company would be on a fair competitive basis so far as the cost of mining and transportation are concerned. But as between the railroad company and its coal company it matters not whether the profit comes from mining or transporting the coal. So, therefore, if, instead of the \$1 rate above mentioned, the railroad company were to establish a rate of \$1.50 per ton, the railroad and its coal company could still sell coal at tidewater for \$3 per ton, standing a deficit of 50 cents per ton in the mining price and taking an equal profit in the transportation price. But the independent operator cannot recoup himself in this manner, and the best price that he could make at tidewater would necessarily be the mining price of \$2, plus the carrying charge of \$1.50, or \$3.50; and he would enter the market at a disadvantage of 50 cents per ton as compared with the railroad and its coal company. It is obvious that such an advantage would enable the railroad company and its alter ego, the coal company, to monopolize the field of production and the selling market. Whatever the means employed, it is a fact that the railroad coal company has monopolized the coal field served by it. In 1901, 47 per cent. of the defendant's coal tonnage to Perth Amboy was controlled by it and 53 per cent. by independent operators; while in 1908 the defendant controlled 95 per cent. of the anthracite tonnage over defendant's line to Perth Amboy and the independent operators 5 per cent. During the same period



complainants' shipments to Perth Amboy decreased from 147,811 tons for 1901 to 40,562 tons for 1908.

63 Coming now to the question of the reasonableness of the rates, counsel for defendants asserts that the rates on coal must be sufficient to produce four results, viz: (1) An income sufficient to make up for past deficiencies in current return on investment. (2) A reasonable current annual return upon the investment in the railroad and transportation adjuncts. (3) An amount sufficient to provide reasonably for keeping the property up to constantly modern standards—i. e., such improvements as are necessary for public convenience and safety and to enable the railroad to get business in competition with other roads. (4) An amount sufficient to provide for a return of the principal of the investment, when and as this principal becomes reduced and extinguished by the exhaustion of coal freight.

Under the first proposition defendant argues that the present rates should be sufficiently high to enable it now to earn the amount by which it has fallen short of paying a 6 per cent. annual dividend in the past, or at least as far back as 1894. It shows that a dividend rate of 6 per cent. applied to its common stock of \$40,441,100 for the period from November 30, 1894, to June 30, 1908, would amount to \$35,091,276; that during this period the dividends paid amounted to \$7,260,264; and argues that upon a 6-per-cent basis the common-stock shareholders suffered a deficiency in dividends during this 14½-year period of \$27,831,112. In the Wilgus estimate above mentioned 10 cents per ton is added to the assumed cost of carrying coal to Perth Amboy for the purpose of "making good the deficit of over \$20,000,000 in dividends" for past years.

Assuming, without conceding, that the present producers and consumers of anthracite coal must bear the burden of the misfortunes or mismanagement of a previous generation, it is worth while to inquire whether this claim does not amount for the most part to a declaration, not that the shareholder is entitled to a fair dividend, but rather to an assertion that he may invest his dividends in improvement of the property and have it in cash also.

Certain aspects of the financial condition of the Lehigh Valley for the years 1901 to 1910, inclusive, are set forth in the following table:

Year ending June 30—

Item	1901	1902	1903	1904	1905	1906	1907	1908	1909	1910
<b>Sec. A. MILEAGE:</b>										
1. Owned—single track, miles.....	317.67	317.59	316.98	311.63	306.12	306.70	302.30	302.30	293.06	302.61
2. Owned—all tracks, miles.....	797.17	799.69	797.84	789.69	802.09	816.42	824.66	824.66	832.99	840.86
3. Operated—single track, miles.....	1,387.28	1,387.24	1,382.16	1,382.67	1,393.47	1,429.16	1,443.24	1,443.24	1,445.67	1,440.25
4. Operated—all tracks, miles.....	2,905.48	2,923.31	2,953.68	2,971.87	3,003.30	3,123.46	3,163.30	3,163.30	3,228.49	3,261.43
<b>Sec. B. COST OF ROAD AND EQUIPMENT:</b>										
Per mile owned—single track.....	\$37,657.712	\$37,657.712	\$46,426.650	\$46,426.650	\$48,410.162	\$48,410.162	\$54,365.714	\$54,365.714	\$58,533.942	\$61,443.218
Per mile owned—all tracks.....	118,543	118,550	146,450	149,009	157,115	157,842	178,840	178,840	194,395	203,044
<b>Sec. C. TOTAL CAPITALIZATION:</b>										
Per mile owned—single track.....	\$7,416,176	\$7,420,100	\$8,301	\$8,301	\$9,355	\$9,355	\$10,319	\$10,319	\$11,381	\$12,443
Per mile owned—all tracks.....	27,713.06	27,713.06	32,837.10	32,837.10	38,984.10	38,984.10	45,130.10	45,130.10	51,276.10	57,422.10
Capital stock.....	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000	100,000
Funded debt.....	40,441.00	40,441.00	40,441.00	40,441.00	40,441.00	40,441.00	40,441.00	40,441.00	40,441.00	40,441.00
<b>Sec. D. TOTAL OPERATING REVENUES:</b>										
Per mile operated—single track.....	17,049	17,062	18,455	18,455	21,692	22,426	24,480	24,480	25,854	26,469
Per mile operated—all tracks.....	8,141	8,197	8,698	8,698	10,067	10,228	11,176	11,176	12,122	12,698
<b>Total operating expenses:</b>										
Per mile operated—single track.....	18,676.927	18,103.254	18,377.822	18,253.917	18,446.280	18,682.636	21,700.358	21,700.358	22,541.146	23,214.256
Per mile operated—all tracks.....	13,462	13,771	13,301	13,106	13,283	13,772	15,036	15,036	16,587	16,835
Ratio to total operating revenues..... per cent.....	6,428	6,835	6,222	6,143	6,142	6,291	6,860	6,860	7,362	7,362
<b>Analysis of operating expenses under official classification:</b>										
Maintenance of way and structures.....	78.96	80.71	71.53	63.67	61.01	61.41	61.50	61.50	64.16	62.42
Per mile operated—single track.....	4,341.717	4,632.597	4,090.189	3,053.204	3,269.381	3,183.245	3,196.854	3,196.854	3,273.389	3,463.943
Per mile operated—all tracks.....	3,067	3,240	2,944	2,196	2,346	2,306	2,215	2,215	2,348	2,404
Ratio to total operating revenues..... per cent.....	1,460	1,885	1,588	1,029	1,089	1,066	1,011	1,011	1,010	1,062
<b>Maintenance of equipment:</b>										
Per mile operated—single track.....	17.93	19.58	16.96	10.67	10.82	9.83	9.06	9.06	9.37	9.06
Per mile operated—all tracks.....	4,445.244	5,149.923	4,684.386	4,744.252	4,894.269	5,465.194	6,186.642	6,186.642	5,832.450	5,996.810
Ratio to total operating revenues..... per cent.....	3,206	2,712	3,372	3,467	3,811	3,832	4,287	4,287	4,034	4,163
<b>Maintenance of way and structures:</b>										
Per mile operated—single track.....	1,581	1,702	1,589	1,094	1,030	1,751	1,966	1,966	1,799	1,838
Ratio to total operating revenues..... per cent.....	18.81	21.76	13.27	16.54	16.19	17.12	17.54	17.54	16.68	15.71

## LEHIGH VALLEY RAILROAD COMPANY.—CONTINUED.

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Item	Year ending June 30—									
	1901	1902	1903	1904	1905	1906	1907	1908	1909	1910
Traffic and transportation expenses.....	9,251,820	8,581,666	8,964,825	9,857,585	9,694,567	10,421,778	11,686,787	12,121,580	10,760,303	11,512,285
Per mile operated—single track.....	6,469	6,186	6,440	7,078	6,865	7,282	8,098	8,373	7,443	7,993
Per mile operated—all tracks.....	3,184	2,905	3,035	3,317	3,228	3,326	3,691	3,755	3,320	3,520
Ratio to total operating revenues, per cent.....	39.11	36.25	34.89	34.38	32.06	32.52	33.12	32.39	30.79	30.17
General expenses.....	735,146	738,677	619,533	595,895	587,011	621,218	630,075	637,940	708,764	713,149
Per mile operated—single track.....	530	513	445	428	421	436	436	441	491	495
Per mile operated—all tracks.....	253	253	210	201	195	198	196	198	219	219
Ratio to total operating revenues, per cent.....	3.11	3.12	2.41	2.08	1.94	1.94	1.78	1.71	2.03	1.87
Analysis of operating expenses between labor and other expenses:										
Compensation paid direct to labor.....	9,193,572	9,965,715	10,550,679	10,977,294	10,920,360	12,013,753	14,282,297	12,891,826	12,113,151	13,703,030
Per mile operated—single track.....	6,631	7,205	7,579	7,882	7,834	8,406	9,896	8,905	8,379	9,514
Per mile operated—all tracks.....	3,166	3,419	3,572	3,694	3,636	3,854	4,515	3,963	3,737	4,202
Ratio to total operating revenues, per cent.....	38.89	42.23	41.07	38.29	36.12	37.49	40.48	34.44	34.65	35.92
Compensation paid general officers.....	130,362	128,320	145,835	116,746	108,186	104,576	125,718	178,063	484,768	160,821
Per mile operated—single track.....	100	93	165	84	74	73	90	123	128	112
Per mile operated—all tracks.....	48	44	49	39	34	33	41	56	57	49
Ratio to total operating revenues, per cent.....	.59	.54	.66	.40	.34	.32	.37	.49	.53	.42
Material, fuel, and all other items.....	9,338,003	8,979,219	7,661,406	7,161,877	7,421,682	7,563,705	7,286,343	10,942,147	10,243,226	9,950,405
Per mile operated—single track.....	6,731	6,473	5,517	5,143	5,326	5,293	5,060	7,559	7,085	6,909
Per mile operated—all tracks.....	3,214	3,072	2,601	2,410	2,472	2,414	2,304	3,389	3,160	3,061
Ratio to total operating revenues, per cent.....	39.46	37.94	29.90	24.98	24.55	23.60	20.65	29.23	29.31	26.08

## LEHIGH VALLEY RAILROAD COMPANY.—CONTINUED.

Item	Year ending June 30—									
	1901	1902	1903	1904	1905	1906	1907	1908	1909	1910
SEC. D. TOTAL OPERATING REVENUES—										
Continued.										
Taxes										
Per mile owned—single track	\$312,182	\$285,781	\$289,986	\$471,262	\$538,933	\$468,849	\$960,501	\$850,361	\$750,494	\$734,998
Per mile owned—all tracks	983	901	915	1,512	1,749	1,529	2,185	2,812	2,575	2,627
Per mile operated—single track	392	358	364	589	672	575	801	1,020	937	946
Per mile operated—all tracks	225	206	208	338	387	328	438	588	540	552
Ratio to total operating revenues..... per cent.	1.07	98	98	139	179	150	209	253	241	244
Operating income	1.31	1.21	1.13	1.65	1.78	1.47	1.87	2.27	2.23	2.09
Per mile operated—single track	4,663,106	4,279,637	7,024,332	9,945,183	11,251,182	11,899,393	12,936,522	12,564,346	11,628,314	13,541,920
Per mile operated—all tracks	3,392	3,065	5,046	7,141	8,072	8,326	8,966	8,679	8,044	9,402
Ratio to total operating revenue..... per cent.	1,606	1,464	2,378	3,346	3,746	3,797	4,086	3,892	3,587	4,152
SEC. E. INCOME ACCOUNT:	19.73	18.08	27.34	34.68	37.21	37.12	36.53	33.57	33.27	35.49
Operating income from rail-road operation	4,663,106	4,279,637	7,024,352	9,945,133	11,251,182	11,899,393	12,936,522	12,564,346	11,628,314	13,541,920
Additions to income: (total of items 1 and 2 following:—	1,286,836	1,367,808	1,690,828	1,682,763	1,490,208	1,548,521	1,738,188	1,474,833	1,057,273	1,463,372
1. Rents received from other roads for the use of road, equipment, and facilities of the operating property										
2. Interest on bonds and dividends on stocks in separately operated railroads and income from other miscellaneous property	718,098	621,011	932,233	1,209,376	1,040,498	789,570	761,050	502,551	282,680	409,013
								108,351		
	568,738	746,797	638,256	473,387	453,010	806,851	945,138	856,921	764,643	1,064,359

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## LEHIGH VALLEY RAILROAD COMPANY.—CONTINUED.

Item	Year ending June 30—									
	1901	1902	1903	1904	1905	1906	1907	1908	1909	1910
<b>Deductions from income:</b> (total of items 1, 2, and 3 following)	7,691,757	6,989,222	6,397,633	5,306,695	5,940,251	6,435,014	6,559,167	6,046,522	6,841,783	6,867,892
1. Rents paid for lease of roads which form a part of the operating property	2,724,019	2,743,965	2,727,228	2,329,434	2,410,967	2,453,296	2,247,253	2,520,523	2,748,305	2,783,893
2. Rents paid to other roads for the partial use of road, equipment, and facilities needed in operating the property	706,919	526,253	562,258	574,384	444,471	430,176	373,836	185,833	150,046	173,270
3. Interest accrued on funded and floating debt	3,660,819	3,719,384	3,018,047	3,000,277	3,084,813	3,549,582	3,888,019	3,960,178	3,942,659	3,890,729
<b>Corporate income for the year</b> Per cent on capital stock outstanding sec. C.	Def. 1,139,815	Def. 1,352,777	2,377,247	5,729,561	6,894,439	7,021,810	8,030,543	7,432,647	8,543,804	8,137,000
<b>SEC. F. PROFIT AND LOSS ACCOUNT:</b> Accumulated surplus brought forward from preceding year	2.82	3.29	5.88	14.14	16.82	17.36	20.61	18.38	14.45	20.12
Corporate income for the year	77,014	Def. 1,176,258	Def. 3,372,147	1,829,681	5,914,796	8,037,225	11,582,915	14,009,383	16,516,394	19,212,282
Discount on securities bought and sold and other profit	Def. 1,139,815	Def. 1,352,777	2,377,247	5,729,561	6,894,439	7,021,810	8,030,543	7,432,647	8,543,804	8,137,000
<b>Total surplus available for distribution</b>	-296,196	-861,112	+3,883,703	+38,554	-1,454,371	-1,403,971	-1,262,541	-719,059	-135,110	-309,617
Per cent on capital stock outstanding sec. C.	Def. 1,361,996	Def. 3,372,147	2,896,863	7,289,086	11,294,864	14,573,164	18,221,917	20,722,871	22,275,688	23,995,025
Dividends declared	3.37	8.34	5.14	18.25	27.49	28.04	45.06	51.24	54.98	66.06
Additions, betterments, and permanent improvement appropriations					1,225,969	1,624,622	2,144,044	2,430,763	2,439,163	2,480,703
Sinking and special reserve funds			1,266,182	1,479,320	2,411,550	1,570,227	2,008,550	1,363,834	580,206	843,877
<b>Total surplus appropriated</b> Per cent on capital stock outstanding sec. C.	Cr. 183,728		1,266,182	1,479,320	2,637,559	3,194,249	4,212,134	4,265,867	5,013,446	5,857,745
Unappropriated surplus carried over to the following year	45		3.19	5.91, 796	6.82	7.50	10.42	10.40	7.45	.85
	Def. 1,176,258	Def. 3,372,147	1,620,681	5,914,796	8,057,325	11,880,315	14,009,383	16,516,394	19,212,282	21,219,780

68 The figures for years prior to 1901 are not given above because we have not had them revised to conform to the present system of accounting; but from 1895 onward they tell practically the same story—that is, the charges to maintenance of way from 1895 to 1904 were abnormal as compared with the years 1905 to 1910. During this 10-year period the density of tonnage per mile of line has increased about 30 per cent. Three of the large items of operating expenses, namely, maintenance of equipment; compensation to labor; and material, fuel and supplies, show an increase somewhat proportionate to the increase in density of tonnage; while the fourth large item of operating expense, maintenance of way and structures, has decreased from \$3,057 per mile in 1901 and \$3,340 in 1902 to \$2,404 in 1910. The only inference which can be drawn from these figures is that in the period from 1895 to 1902 the shareholders elected to devote surplus earnings to rebuilding and improving their road instead of distributing the earnings to themselves in the form of dividends. The excess of the maintenance of way item alone for several years prior to 1903 over that for 1910 was sufficient to pay a 2-per-cent. dividend on the stock. The devotion of earnings to permanent improvements and betterments was no doubt a wise policy on the part of those in control of the road. But the indications are that the shareholders have already received the benefit of that policy, even though it has not come in the form of cash dividends covering the period in question. From 1894 to 1903 the average market value of Lehigh Valley Railroad stock was in the neighborhood of \$75 per share. At this writing the same stock is quoted at \$178. Thus a person who had invested in Lehigh Valley at par prior to 1904, has benefited by an appreciation in value of his stock to the amount of 5 per cent. per annum since 1894 and has received dividends gradually increased from 2 per cent. to 5 per cent. since 1905. The earnings in 1910  
69 were sufficient to pay a dividend of 20.12 per cent., but the company elected to increase its unappropriated surplus from \$19,212,252 in 1909 to \$27,219,890 in 1910. Moreover, the Lehigh Valley Railroad Company has been carrying amongst its assets certificates of indebtedness of the Lehigh Valley Coal Company amounting to \$10,537,000, upon which no interest is collected. Interest on this indebtedness would be sufficient to pay a 1-per-cent. dividend on the stock. We should hesitate to assent to defendant's first proposition that present shippers must bear the burden of earlier misfortunes of the road, but it is unnecessary to decide that point in this case because it has been sufficiently demonstrated that the shareholders have received a fair return on their investment, taking into consideration the money actually received in dividends, the increased value of their shares, the increased value of the property, and the large unappropriated surplus. It follows therefore that the allowance in the Wilgus estimate of 10 cents per ton to make up for this alleged deficit should be eliminated from the calculation.

Defendant's second and third contentions that the rates should be sufficient to guarantee a fair annual return on the investment and to provide reasonably for keeping the property up to improved mod-

ern methods are sound but have little bearing on this case, in view of the summary of the road's finances above set forth. It will be noted by referring to that tabulation that defendant's corporate income was sufficient to pay a dividend on the capital stock of 16 per cent. in 1905, 17 per cent. in 1906, 20 per cent. in 1907, 18 per cent. in 1908, 14 per cent. in 1909, and 20 per cent. in 1910. Instead of paying such dividends it has paid 5 per cent. on its capital stock appropriated to additions, betterments and improvements sur-  
 ranging from \$580,206 to \$2,068,590 per annum, and his increase  
 70        780 in 1910. Certainly it must be conceded that the present rates provide liberally for a fair annual return on the investment and the proper maintenance of the property.

As noted, the Lehigh Valley Railroad Company carries among its assets \$10,537,000 non-interest bearing certificates of indebtedness of the Lehigh Valley Coal Company. At 5 per cent. per annum the interest on these certificates would be \$526,850. The latter sum in all substantial respects a rebate to the Lehigh Valley Coal Company. The proportion of the total tonnage from the anthracite field shipped by the Lehigh Valley Coal Company does not appear, but it is of record that it ships about 95 per cent. of the coal to tidewater. If its proportion of the total traffic is the same as that of tidewater its tonnage for 1910 was in the neighborhood of 10,500,000 tons and the net result of the transportation as between it and its competitors was the same as if it had had its coal transported for 5 cents per ton less than the independent dealers. Referring to the same matter in *Coxe Brothers Co. v. L. V. R. R. Co.*, supra, the Commission said:

The railroad company advances to the coal company nearly \$1,000,000 with which to transact its business, and for the use of which the railroad company receives no advantage other than such advantages as it gets from carrying the freight of the coal company. The value of the annual use of such advances at 5 per cent. interest amounts to \$350,000, nearly. This sum exceeds 10 cents per ton on all the coal shipped by the coal company over the lines of the railroad company, and is to that extent an undue preference given to said coal company, to the disadvantage of Coxe Brothers & Company and other shippers who receive no advances. The advantage of like advances if made to complainants, estimated on their annual  
 71        shipments, would exceed \$100,000. Had the Lehigh Valley Railroad as a means of securing freight made like advances to any other competitor of complainants, whether an individual operator or a coal company in which the railroad company had no interest, would hardly be contended that such act did not amount to undue preference and unjust discrimination. The fact that the road was interested in the coal company, as the owner of its capital stock does not make lawful what would be unlawful without such interest.

Defendant has filed an exhibit purporting to show that its average revenue for the transportation of coal to Perth Amboy from 1898 to 1908 has been \$1.46 per gross ton. Assuming that by the loan to the coal company defendant loses interest charges amounting roughly to 5 cents per ton, the average just given would be reduced to \$1.



per gross ton. In the Coxe Brothers case, decided in 1891, the Commission decided that a fair return to defendant upon traffic here involved would be an average of \$1.40 per gross ton. The rates ordered as a result of that decision were never put in force because, whole litigation resulting therefrom was in the courts, it was decided that as the law then stood the Commission was without authority to fix a rate for the future. Since that decision density of tonnage has increased, the ratio of operating expenses to income has materially decreased, grades have been eliminated, train loads and car capacities have materially increased; in short, every factor which ought to make for lower rates has been present. But the rates charged have produced revenue of about 6 cents per ton in excess of that found reasonable by the Commission.

Turning again to the Wilgus exhibit, we find the estimated cost of transporting a ton of coal from the Wyoming region to Perth Amboy is \$1.49. But we have shown that 10 cents of that

72 amount, designed to cover past deficits, is an improper charge.

Therefore \$1.39 would be the cost if the exhibit were accurately and properly constructed on the basis of facts known to the witnesses. In considering this exhibit it must be remembered that the so-called cost does not mean operating expense. The item of \$1.49 is designed to cover all proper, possible, and probable charges, including not only interest and depreciation charges, but other items, such as the 10-cent allowance above mentioned. Therefore, if the exhibit were not open to objection, it would be seen that, after eliminating the 10-cent charge above referred to, defendant's rates on the several sizes of anthracite coal ought to bring them revenue averaging \$1.39 per gross ton. That is to say upon defendant's own showing it is collecting rates which have been on the average 7 cents per ton in excess of a reasonable rate.

After a careful study of defendant's exhibits relating to tonnage and cost of movement, as well as painstaking analysis of defendant's voluminous exhibits respecting its past and present financial condition, we are of opinion and so find that defendant's rates for the transportation of coal from the Wyoming region to Perth Amboy of 1.55 per gross ton on prepared sizes, \$1.40 on pea coal, and \$1.20 on buckwheat coal, are unreasonable so far as they exceed \$1.40 on prepared sizes, \$1.30 on pea coal, and \$1.15 on buckwheat. If the relative tonnage of the several sizes continues as it has in the past, the rates herein found to be reasonable would result in an average reduction in defendant's revenue per gross ton for hauling coal to Perth Amboy of about 11 cents below the figure of \$1.46 for the ten years from 1898 to 1908. As applied to 1908 the last year for which anthracite tonnage to Perth Amboy is shown in the record, the proposed rates would have resulted in reducing its operating revenue by

73 about \$247,000 and apparently 95 per cent. of this amount would accrue to the benefit of the railroad coal company. By reference to the table above set forth it is at once apparent that such a reduction will have no serious effect on defendant's revenues and will afford ample allowance for interest charges, operation, dividends, and all proper reserve funds.

We are further of opinion that reparation should be awarded upon

basis of the rates herein found to be reasonable upon all shipments of coal by complainants from the Wyoming region to Perth Amboy since August 1, 1901. The amount of reparation which should be awarded under our finding in this case can not be ascertained from the exhibits now on file, and such further proceeding will be had as may be necessary to determine the amount of money due to complainants.

*Order.*

At a General Session of the Interstate Commerce Commission, Held at Its Office in Washington, D. C., on the 8th Day of June, A. D. 1911.

**Present:**

Judson C. Clements, Charles A. Prouty, Franklin K. Lane, Edgar E. Clark, James S. Harlan, Charles C. McChord, Balthasar H. Meyer, Commissioners.

No. 1180.

HENRY E. MEEKER and CAROLINE H. MEEKER, Co-partners, Trading as Meeker & Company,

v.

LEHIGH VALLEY RAILROAD COMPANY.

74 This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That defendant Lehigh Valley Railroad Company be, and it is hereby notified and required to cease and desist, on or before the 15th day of August, 1911, and for a period of two years thereafter to abstain from charging, demanding, collecting or receiving its present rates for the transportation of anthracite coal in carloads from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., as follows, to wit: upon prepared sizes \$1.55 per gross ton; on pea coal \$1.40 per gross ton; and on buckwheat coal \$1.20 per gross ton; which said rates have been found by the Commission in its said report to be unreasonable.

It is further ordered, That said defendant be, and it is hereby notified and required to establish, on or before the 15th day of August, 1911, and for a period of two years thereafter to maintain, and apply to the transportation of anthracite coal in carloads from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., rates not in excess of the following, to wit: \$1.40 per gross ton on prepared sizes of said coal; \$1.30 per gross ton on pea coal; and \$1.15 per gross ton on buckwheat coal; which said rates have been found by the Commission in its said report to be reasonable.

*Order of Court.*

Filed Sept. 3, 1912.

And now, September 3, 1912, the petition of Henry E. Meeker, surviving partner of the firm of Henry E. Meeker and Caroline H. Meeker, doing business under the trade name of Meeker & Company, in the above proceeding having been filed and the averments thereof considered, it is ordered that the Lehigh Valley Railroad Company be and it is hereby directed and ruled to file a plea, answer or demurrer to said petition within twenty days of the service of a copy of said petition, together with a copy of this Order, or judgment sec. leg.

J. W. THOMPSON, *Judge.**Plea.*

Filed Oct. 5, 1912.

To the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania:

The defendant, the Lehigh Valley Railroad Company, for a plea in the above stated case pleads Not Guilty; and further pleads the bar of the Statutes of Limitation applicable to the plaintiff's claim; and for further plea in this behalf defendant avers that the Interstate Commerce Commission has no jurisdiction to make the findings and order of reparation which the plaintiff seeks to enforce by this proceeding, and further that there was before the Commission no substantial evidence to sustain said findings and said order.

E. H. BOLES,  
*Solicitor for Defendant.*

143 Liberty Street, Borough of Manhattan, New York City.

76

*Jury.*

And afterwards, to wit, on the 11th day of November, 1912, a jury being called, comes, to wit:

Charles E. Wolle,  
Jacob W. Klein,  
Alexander Martin,  
H. A. Walker,  
A. Lincoln,  
Francis X. Wolf,

Frankhouse,  
George T. Van Norman,  
Horace T. Greenwood,  
Charles J. Pfifer,  
Charles G. Gilmour,  
Jacob D. Levan.

who are respectively sworn or affirmed to try the issue joined.

*Verdict.*

And afterwards, to wit, on the twelfth day of November, 1912, the jurors aforesaid upon their oaths and affirmations respectively do

say that they find for plaintiff and assess the damages at One Hundred and Nine Thousand Two Hundred and Eighty and 17-100 (\$109,280.17) Dollars.

*Bill of Exceptions.*

Be it remembered that at said September Sessions came the said plaintiff into the said Court and impleaded the said defendant in a certain plea of trespass, etc., in which the said plaintiff declared prout narr and the said defendant pleaded "not guilty." And thereupon issue was joined between them.

And afterwards, to wit, at a session of the said Court held in the District aforesaid, before the Honorable James B. Holland, Judge of the said Court, on the Eleventh day of November, 1912, the aforesaid issue between the said parties came to be tried by a jury of said

77 District for that purpose duly impaneled prout list of jurors, at which date came as well the said plaintiff as the said defendant, by their respective attorneys; and the jurors of the jury aforesaid impaneled to try the said issue being also called, came and were then and there in due manner chosen and sworn or affirmed to try the said issue, and upon the trial the counsel of the said plaintiff and defendant respectively offered evidence as follows:

Before Hon. James B. Holland, J., and a Jury.

PHILADELPHIA, Monday, November 11th, 1912.

Present:

William A. Glasgow, Esq., and John H. Hall, Esq., representing the plaintiff.

Everett Warren, Esq., Frank H. Platt, Esq., and Edgar H. Boles, Esq., representing the defendant.

Jury sworn or affirmed November 11th, 1912.

*Evidence on Behalf of the Plaintiff.*

HENRY EUGENE MEEKER, having been duly sworn, was examined and testified as follows:

By Mr. GLASGOW:

Q. You were a member of the firm of Meeker & Company, were you?

A. Yes.

Q. Who was the other member?

78 A. My mother, Caroline H. Meeker.

Q. During the pendency of the complaint that I will show you in a moment before the Interstate Commerce Commission, your mother died?

A. Yes.

Q. And the business was continued in your name as surviving partner of the firm?

A. Yes.

Q. Was your firm engaged in the coal business, and, if so, where?

A. Yes, sir; in New York City.

Q. Did you have an office there?

A. Yes.

Q. What was your business?

A. Merchandising coal?

Q. Buying and selling coal?

A. Yes, sir.

Q. Did you buy anthracite coal?

A. I bought anthracite coal at the breaker.

Q. Did you buy in the Wyoming Region prior to November 1st, 1900?

A. Yes.

Q. What coal did you buy?

A. I bought coal from the Stevens Coal Company, and several other coal companies.

Q. The coal which is the subject of the complaint here was the coal of the Stevens colliery, was it?

A. The majority of it was. But some of it came from other companies.

Q. But all of it came from that district?

A. All of it came from the Wyoming region.

Q. Where did you ship that coal?

A. I shipped the majority of it to Perth Amboy.

Q. The coal which is the subject of the complaint here is the coal which you shipped to Perth Amboy?

A. It is.

Q. During the time from November 1st, 1900, to August 1st, 1901, how were the rates which the Railroad Company was to receive upon the coal arrived at?

79 A. They were arrived at by taking a general average price received for prepared sizes, for pea and for buckwheat, by the Lehigh Valley Coal Company.

Q. At tidewater?

A. At Perth Amboy. Of that average price we were charged forty per cent.

Q. As the freight rate?

A. As the freight rate. That is, all except two months. I think the last two months they made a charge on a different basis. We were charged forty per cent., but for the last two months, as I recollect it——

Q. Then, was any question raised as to a readjustment? That forty per cent was called "adjusted" rates, was it not?

A. We were originally charged tariff rates, and then each month we received the same adjustment that the other shippers received.

Q. And they were called "adjusted rates"?

A. Yes, sir.

Mr. PLATT: As to these shipments alleged to have been made

the 1st of November, 1900, and the 1st of August, 1901, as Mr. Glasgow has said, they are based upon Section 2 of the Interstate Commerce Act. That is to say, the allegation here is that the Interstate Commerce Commission made an award of damages, which is contained in the order of the Commission, which Mr. Glasgow has referred to, for acts of discrimination as distinguished from acts of overcharge. Those are the ones about which Mr. Meeker is being asked at the present time.

As to those, we raise certain questions of limitation, and if this is the proper point to present them, I would like to present them in objection to the testimony. If your Honor will hear an objection to the testimony on the ground that all of those that he is testifying to now are barred by the statute of limitations.

80 The COURT: Then, you object to this testimony on the ground that it is in support of a claim barred by the statute of limitations?

Mr. PLATT: Yes, sir.

The COURT: I will hear you on that. It is with reference to between November 1st, 1900, and August 1st, 1901?

Mr. GLASGOW: Yes, sir; and the complaint in the case before the Commission was filed on the 17th of July, 1907.

The COURT: Within six years?

Mr. GLASGOW: Yes, sir. You see, your Honor, the agreement as to the 65% and to pay it back did not take place until August 1st, 1901. The complaint was filed on July 17th, 1907. So that it runs back to July 17th, 1901, under any phase of the case.

Mr. PLATT: Yes; and, if your Honor please, I plead the five years' statute of the United States contained in Section 1047 of the Revised Statutes of the United States.

(Mr. Platt read Section 1047 of the Revised Statutes of the United States.)

(Mr. Platt also cited the case of Parsons vs. Railroad, 167 United States; and Carter vs. Railroad, U. S. Circuit Court of Appeals, Fifth Circuit, decided January, 1906.)

Therefore, our contention is that that ruling is just exactly on all fours with this case, as to these claims for discrimination between November 1st, 1900, and August 1st, 1901. The petition itself in the Commerce Court, if that fixes a date, was not filed until more than five years after August 1st, 1901. Of course, the filing of the complaint in this case—the filing of the petition is it called—

81 in this case before your Honor in this court, is the time that we contend controls the statute. That was not filed until the 3rd of September, 1912. But, in any event, even though it could be held that the time commenced to run—which I would not concede—that the filing of the petition in the Commerce Court was the material date, even though that were to be held, still that was not within five years.

In order to make the record perfectly clear, I move your Honor to strike out the testimony of the witness to the last two questions.

Mr. GLASGOW: I want to ask a question or two there, so the



objection can be properly made on the record. I do not think it is properly there now.

By Mr. GLASGOW:

Q. Did you have any conversation with any of the Lehigh Valley Railroad Company officers as to what rate you were to have on coal from the Wyoming region to Perth Amboy?

Mr. PLATT: I make the same objection to that.

Mr. GLASGOW: I want to prove what rate he was to get when he went there and shipped.

Mr. PLATT: I also object on the further ground that it is incompetent. It does not make any difference what arrangement he made. There was a schedule rate in force at the time.

The COURT: All of this, Mr. Glasgow, is in support of a claim that is now objected to upon the ground that the statute of limitations bars it.

Mr. GLASGOW: Yes, sir. I am just going to show your Honor the evidence that this has demonstrated the incorrectness of the view that this is a penalty or forfeiture. When Mr. Meeker went there to ship coal, prior to the time that this claim arose, he was told by the Lehigh Valley Railroad Company that he should have the same rate that everybody else had, and they violated that agreement with him. Of course, this is the first time that these gentlemen have ever had the temerity to present that the statute of limitations barred this over the United States statute, but this is an after-thought, which has never yet occurred in connection with it.

I want to show the circumstances under which he went to ship there and the fact that he was guaranteed by the officers that he would be treated as everybody else was treated, and that this suit is on the reparation order of the Commission, showing that he had been discriminated against and not treated as everybody else, and that they had violated the contractual rights that existed between the shipper and the carrier. It is not a forfeiture and not a penalty, but a violation of their contractual rights. If it amounts to discrimination the discrimination shows. That a man has been unjustly discriminated against shows that they have not observed that contractual right, which was to treat everybody equal and upon a parity.

The COURT: Do not all shippers make a bargain in the same way, and is not your claim for discrimination under Section 2?

Mr. GLASGOW: Yes, sir; that is correct.

The COURT: And you must stand upon your right to claim under Section 2?

Mr. GLASGOW: Exactly.

The COURT: And it depends on whether it is a forfeiture or penalty or not?

Mr. GLASGOW: Yes, sir.

82 The COURT: Nothing that was said as to what freight rate he would have had anything to do with it.

Mr. GLASGOW: Except that it shows that Meeker's relation to this company was the same as other shippers; that there was a con-

tractual right, and when they violated Section 2 they violated a contractual right.

The COURT: But you are not suing on the contractual right. You are suing on the right to claim under Section 2?

Mr. GLASGOW: Exactly.

The COURT: For what the defendant contends is a penalty. The objection is overruled, and the plaintiff will be permitted to prove that he made a contract to ship.

Mr. PLATT: Will your Honor allow me just a word further in regard to that? Of course, this petition here does not come to this court in such a condition as that. It represents no contract. There could not be a contract of that kind that would be valid, in the first place, and, in the next place, if he is suing on a contract, if this should be converted into an action on a contract, then the State statute of six years running from the 3rd of September, 1912, would apply.

Now, I want to say that this is no afterthought. We had no power to raise this five years' question at the time the case was before the Commission, because under our theory, according to our theory of the law, which I have no doubt is right, the time when the statute runs any way is from the time of the commencement of the action in this court.

The COURT: What he wants to show now is that he had a contract with the Railroad to ship on the same terms as other shippers.

84 Just what it has to do with the case we will not determine now, but I will permit him to prove it. The objection is overruled.

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)

(The following question read:

"Q. Did you have any conversation with any of the Lehigh Valley Railroad Company officers as to what rate you were to have on coal from the Wyoming region to Perth Amboy?")

A. Yes, I did; with Mr. George F. Taylor, the coal freight agent.

By Mr. GLASGOW:

Q. What was the understanding?

Mr. WARREN: May I not ask the witness to say the time when that conversation took place? I submit that he ought to be interrogated on that.

By Mr. GLASGOW:

Q. Can you give us the time?

A. It was in the month of November. Just after the strike.

By Mr. PLATT:

Q. November, 1900, you mean?

A. November, 1900, yes. When the question of advancing the prices to the independent operators at the mines was being discussed, and it was practically known in the trade at that time that

it had been agreed to give the independent operators sixty-five per cent.

Mr. PLATT: I move to strike that out. What was known to the trade.

(Motion sustained.)

By Mr. GLASGOW:

Q. You have fixed the time. Will you please state what took place on that occasion?

85 Mr. PLATT: We make the same objection.

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)

A. On that occasion I asked Mr. Taylor if the new rate to the independent operators of 65% became operative, if we would get the 35% rate, and he said, "Of course." In December, or, rather, during November we paid the tariff rate as usual——

By Mr. GLASGOW:

Q. Let me ask you: Did he say anything about how you would be treated on the basis of rates with reference to how other people were treated?

A. He said I would get the same as all. We were talking about the same as everybody else was getting at that time.

Q. On the basis of the rates which you paid during the period from November 1st, 1900, to August 1st, 1901, how much freight did you pay to the Lehigh Valley Railroad Company on shipments of coal from the Wyoming region to Perth Amboy? (Paper handed witness.)

Mr. WARREN: We would like to know what the paper is that is submitted to the witness.

Mr. GLASGOW: It is a memorandum of his.

Mr. WARREN: I assume it is a memorandum probably made up by his bookkeeper or somebody. I assume it is that, is it not?

Mr. GLASGOW: I suppose so.

Mr. WARREN: The schedule you are showing him is the schedule referred to the Commission, is it not?

Mr. GLASGOW: Yes, sir.

86 Mr. WARREN: On that we submit the witness ought not to be permitted to read from a paper that is not in evidence, and make certain deductions from it, the paper not having been in any way either identified or proved, or the correctness of the figure having been established in any way. In other words, it is pure hearsay testimony now.

The COURT: Now, we are right to the point where you were asking what amount he paid during this period, and all this testimony in support of this claim has been objected to upon the ground that the claim is barred by the statute of limitations. That objection was made to some questions that were asked some time ago. Now, it seems to me that the objection is properly applicable to this ques-

tion, and I will hear Mr. Glasgow in answer to the defendant, if they make that objection.

Mr. WARREN: We would like to interpose that objection. That is to say, that this evidence is incompetent—

The COURT: This is objected to upon the ground that it is in support of a claim barred by the statute of limitations?

Mr. WARREN: Yes, sir; as well as the other ground.

Mr. GLASGOW: If your Honor please, we have not gotten to the point where you can discuss the statute of limitations, for the reason that I have not yet shown when the complaint was filed before the Commission, and what their action was and their judgment. I have stated it in my argument, of course, but it has not been testified to.

Mr. PLATT: It is in the pleadings.

Mr. GLASGOW: It is in the pleadings, but I have not shown it. So that I have not reached the point where the statute of limitations could be discussed. I just want to show the fact and lead up

87 to the point, "Now, then, when did you first begin your action," and then it is in a position where the plea put it—it is not a demurrer—where the plea which the defendant offers can be considered. But I have not got now before the court on the record the facts as to when the claim originated. I am showing it now, and I am going to show when the first proceeding was taken to enforce their right, and following it with that.

The COURT: I do not think you ought to be permitted to prove your case before the defendant is permitted to interpose the plea of the statute of limitations.

Mr. GLASGOW: That is a plea.

The COURT: I know it is a plea, but it is defence, too, and they are interposing it in defence, and they can interpose it as soon as you begin your claim.

Mr. GLASGOW: I have no objection to passing on it now, if I can just get on the record the time when we first began our proceedings, so as to show when we were in court asserting our rights. I was leading up to that.

Mr. WARREN: The way to do that, I submit, would be to put in the order.

Mr. GLASGOW: I was following the usual way that I have tried cases where the statute of limitations was, put in your claim, show what your claim is, when you first began proceedings to enforce it, and then you have got facts upon which to say whether the statute applies; but until that is on the record I do not think it is in shape so that your Honor could pass on it, although I am perfectly willing to agree on that and let it go.

Mr. PLATT: May I suggest to your Honor that counsel is bound by his own pleading. His own pleading reads—

88 Mr. GLASGOW: Is that evidence, Mr. Platt? If it is, all right, let it go.

Mr. PLATT: It is evidence against you.

Mr. GLASGOW: But you are not putting in your case yet.

Mr. PLATT: I take it that counsel can hardly say that the ques-

tion of dates is not before the court, when he has pleaded it himself. He has pleaded this alleged discrimination as occurring between November 1st, 1900, and August 1st, 1901, the very thing about which he has been asking Mr. Meeker, in the third paragraph of his complaint.

The COURT: Of course, that is not yet in evidence, or before the Court. That would be all right for you to raise the question of the statute of limitations on the record, but that is not what you do. We will protect the defendant on the question of the statute, after he has proven when he started his suit.

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)

By Mr. GLASGOW:

Q. Can you tell the Court and jury what amount you paid to the Lehigh Valley Railroad Company during the period from November 1st, 1900, to August 1st, 1901, on shipments of coal from the Wyoming region to Perth Amboy?

A. \$129,989.18.

By Mr. WARREN:

Q. That is the aggregate sum you paid in freights?

A. That is the aggregate sum, yes.

By Mr. GLASGOW:

Q. That covered all sizes of coal?

89 A. It did.

Q. Can you tell us what was paid to the Lehigh Valley Railroad Company on that coal if you had been charged on the basis of 35% of the average selling price of coal by the Lehigh Valley Coal Company at Perth Amboy during the period which I have covered?

Mr. WARREN: We desire to interpose the same objections, both as to the competency of the witness, offering this evidence this way, and also upon the ground that it all has to do with items over five years prior to the institution of this suit, and, as an actual fact, more than five years prior to the institution of the proceedings before the Interstate Commerce Commission.

The COURT: What about the schedule he is reading from?

Mr. GLASGOW: It is merely a memorandum for refreshing his memory, made from his books.

The COURT: Just show what it is. There is objection made to it.

By Mr. GLASGOW:

Q. What is the paper that you have in your hand?

A. It is a paper giving the items, tonnages and amounts paid.

Q. Where was it made up?

A. It was made up in my office.

Q. Under your direction?

A. Under my direction.

Q. Do you know that it is correct?

A. I know it is correct.

Q. You made it up for what purpose?

A. I made it up for the purpose of this suit, or, rather, this case before the Interstate Commerce Commission.

The COURT: Do you still object to the paper?

90 Mr. WARREN: The fact is just as the witness has said, that that is the memorandum which he used in the proceedings before the Interstate Commerce Commission. In other words, when they come to offer the order, as they must, here, it speaks of Exhibit 2, and that is this paper, if it be the same as that, we do not interpose any technical objection.

Mr. GLASGOW: That paper that he has is exactly the same as was offered in evidence before the Commission, which the Commission found correct, and he is using it here for the purpose of refreshing his memory.

Mr. WARREN: As long as he says that that paper is the one used before the Commission, we withdraw the objection to it.

By Mr. GLASGOW:

Q. Can you tell me what was the amount which you would have paid on the same coal covering that period if you had been charged on the basis of 35% of the average selling price at Perth Amboy of coal sold by the Lehigh Valley Coal Company?

Mr. PLATT: We object to that. There is no evidence, if the Court please, before this Court that anybody else got 35% and he knows nothing about it.

Mr. GLASGOW: I cannot put in all my evidence at once.

The COURT: He has already testified that he talked with the Lehigh Railroad Company people, and they told him he was to get the same as the rest.

Mr. PLATT: But he has not proved that anybody else got any different rate.

The COURT: He said that they told him he was to get the same treatment, which was 65 and 35. The objection is overruled.

(Objection overruled.)

91 (Exception noted by defendant by direction of the Court.)

(The following question read:

"Q. Can you tell me what was the amount which you would have paid on the same coal covering that period if you had been charged on the basis of 35% of the average selling price at Perth Amboy of coal sold by the Lehigh Valley Coal Company?")

A. \$118,979.85.

By Mr. GLASGOW:

Q. What is the difference between the amount you paid and the amount you would have paid on the basis of the question immediately preceding?

A. \$11,009.33.

Q. Did you file a complaint in the name of Meeker & Company



with the Interstate Commerce Commission setting up a claim to the \$11,009.33, to which you have just testified?

A. I did.

Q. When did you file that complaint with the Commission?

A. On July 17th, 1907.

Q. Did the Commission make an investigation in regard to that complaint?

A. They did.

Q. Did they enter an order in regard to it?

A. They did.

MR. WARREN: Certainly, it is not competent for the witness to say what orders the Commission entered.

MR. GLASGOW: He did not say what order they entered. He said they entered an order.

The COURT: He has not said what order they entered.

92 MR. GLASGOW: I offer in evidence a certified copy of the report of the Interstate Commerce Commission, and of the order attached thereto, in the case pending before that Commission No. 1180, entitled "Henry E. Meeker and Caroline Meeker, co-partners, trading as Meeker & Company, against The Lehigh Valley Railroad Company," decided on June 8th, 1911, and the order entered on the 8th day of June, 1912.

MR. PLATT: If your Honor please, we have several objections to make to that. Our first objection is because the report shows on its face that the causes of action accrued more than five years prior to September 3rd, 1912, the date that the suit was brought, and was hence barred under the five years' Federal Limitation, under Section 1047 of the Revised Statutes, that being the same matter which your Honor has already heard.

MR. GLASGOW refers to the date of the commencement of the proceedings, and of course this objection is intended to cover, in any event, because even the commencement of the proceedings, as has been stated, before the Interstate Commerce Commission was more than five years after August 1st, 1901. I do not know whether your Honor wants to hear me further on that, but I think I have explained to your Honor just exactly what that objection is.

MR. GLASGOW: As to that question, it is disposed of by the Act perfectly under which this was brought. The Act to Regulate Commerce, under which this Act was brought before the Commission, provides that "all claims for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the Circuit

93 Court within one year from the date of the order and not after; provided that claims accrued prior to the passage of this Act may be presented within one year."

This Act was passed on June 29th, 1906, and became effective 60 days thereafter. All claims accruing prior to that were authorized to be brought within one year. That is the statute of limitations that applies to this case.

(Further argument.)

The COURT: This is too important a question to pass on offhand. I will overrule the objection and give the defendant an exception, and pass on it when we can go into it with some degree of care.

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)

Mr. PLATT: There are other objections that I wish to present as to the admissibility of this report.

This proceeding was brought by Mr. Meeker primarily for the purpose of getting the rate fixed for the future, claiming that the existing rate was an unreasonable rate. The schedule rate of the company, the rate that the company was charging at the time Mr. Meeker brought his proceeding, was, on prepared sizes of coal from the Wyoming region to Perth Amboy, \$1.55; and on pea coal \$1.40; and on lower sizes than pea coal, buckwheat and the other sizes, \$1.20.

The Commission's order reduced the price on the prepared sizes which is about two-thirds of the product, from \$1.55 to \$1.40; and the price of the pea coal from \$1.40 to \$1.30; and buckwheat sizes from \$1.20 to \$1.15.

As I say, Mr. Meeker brought his proceeding before the Commission charging that that rate was unreasonable, and the Commission, having been given power, under the Hepburn Act of 1906, to fix future rates, he sought to have the rate for two years in the future reduced, and, incidentally, and in connection with that, he asked for a decision of the Commission, and obtained an order from the Commission as to the past, and divided into two parts, first as to the part between November, 1900, and August 1st, 1901, where he asked for an order finding discrimination, and as to the period between August 1st, 1901, and the time when he commenced his proceeding, July 17th, 1907, when he asked for reparation on the ground that he had been injured by overcharges.

Now, if your Honor will pardon me for explaining that to you. I wanted to get these points just clearly before your mind in reference to these objections that will be made.

Mr. GLASGOW: Is that an objection?

Mr. PLATT: No; I am just explaining it to the Court.

The COURT: He is just leading up to the objection.

Mr. PLATT: The order which Mr. Glasgow offers in evidence at the present time relates only to the future rates, and the report reserves the question of reparation for future action.

Now, we object to that part of the report which relates to shipments prior to September 3d, 1906, on the ground that claims accruing prior to that date are barred by the Pennsylvania statute of limitations.

(Objection overruled.)

(Exception noted for defendants by direction of the Court.)

Mr. PLATT: We object also to the admissibility of the report, in so far as it relates to shipments prior to July 17th, 1902, as barred by the United States statute, Section 1047.

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)

Mr. PLATT: We object, further, this objection being included in the argument that has been made, to that part of the original report which relates to shipments between November, 1900, and August 1st, 1901, on the ground that it is inadmissible evidence because the Commission was without power to make such an order, for the reason that the cause of action was barred by the federal five years' statute, Section 1047, prior to the time when the proceeding commenced before the Commission, the same being for discrimination under Section 2, of the Commerce Act, and therefore being penal causes of action.

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)

Mr. PLATT: We object to so much of the original report as relates to the rates prior to June 29th, 1906, on the ground that the Commission has no jurisdiction. Section 16 provides that claims accruing prior to June 29th, 1906, the date of the passage of the act, must be made the subject of a proceeding before the Commission within one year before the passage of the act, the complaint not having been presented within one year after the passage of the act, to wit, July 17th, 1907.

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)

Mr. PLATT: I object also to so much of the report as relates to the period prior to July 17th, 1905, on the ground that the Commission had no jurisdiction. Section 16 provides that claims accruing within two years prior to the passage of the act might be filed with the Commission within a year after the passage of the act. Since the complaint was not filed until July 17th, 1907, or more than one year after the passage of the act, the Commission had no jurisdiction of claims accruing prior to the two years' period, or prior to July 17th, 1905.

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)

Mr. PLATT: I also object to so much of the report as relates to the period prior to August 28th, 1904, on the ground that the Commission had no jurisdiction.

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)

Mr. PLATT: I also object to so much of the report as relates to the period prior to June 29th, 1904, on the ground that the Commission had no jurisdiction.

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)

Mr. PLATT: I also object to the admission of the original report in evidence, on the ground that the statute under which the report is offered in evidence, the Interstate Commerce act, Section 16, is unconstitutional, in that it deprives the defendant of due process of law, it not being within the power of Congress to provide by legislative enactment that the Interstate Commerce Commission can make findings upon which there may be a claim for reparation for damages to a petitioner before that body, and then

provide that on the trial of a suit to recover such alleged damages the finding and order of the Commission shall be *prima facie* evidence of the facts therein stated.

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)

Mr. PLATT: I also object to the admission of the order and report in evidence on the ground that the report is invalid because on its face it purports to regulate commerce which was completed before the time when the order was made, and which was, therefore, not the subject of regulation.

In other words, if the Court please, I urge this with a great deal of confidence. The power to regulate commerce is a power that applies to the future, not to the past. Commerce that has been transacted is not a subject of regulation. It is not possible to regulate it. The regulation of commerce means the laying down of the rules by which commerce shall be conducted, and when Congress delegated to the Interstate Commerce Commission power to fix rates, it delegated to it a legislative or administrative act, and it could act as to the future. It could lay down the rule, and it could fix the rate, perhaps, as to the future; but what is there within the power to regulate commerce that enables Congress or the Interstate Commerce Commission to regulate the thing which has already occurred and been done? The most that can be done would be to pass some act which related to the recovery of the damages or recovery on a contract; but Congress has no power, under the power to regulate commerce—it cannot have the power, it inherently cannot have the power, and the power to regulate commerce, to regulate something that has happened and been ended and has gone over the dam.

Therefore, I say the report, in so far as it relates to the past, is invalid and of no force, and an order cannot be based upon an invalid report.

Mr. GLASGOW: That has been expressly decided by the Supreme Court. It goes to the whole question, as to whether the Commission can really regulate at all. Of course, the Commission cannot regulate charges for the future. It is bound to be for the past. Now, this proposition is that it cannot regulate it at all.

Mr. PLATT: My proposition is this: that an order which undertakes to regulate something in the past is not an order regulating commerce.

Mr. GLASGOW: I understand your proposition is that you cannot award any reparation for past transactions?

Mr. PLATT: You cannot regulate past transactions.

Mr. GLASGOW: You cannot regulate reparation for past transactions. That is your proposition, is it not? Isn't that it? That as I understand it. I do not want to misunderstand your proposition. It is that you cannot award reparation, that you cannot make any order which relates to past transactions?

Mr. PLATT: My proposition is that this order, this award in the report, purports to be based on a report that undertakes to perform an impossibility, undertakes to regulate something that has already occurred, and it is not the subject of regulation. It cannot be reg-

lated any more than I can regulate the things that I did yesterday.

99 Mr. GLASGOW: It comes down to the proposition that your position is that the Commission, as applicable to this case, cannot award reparation on account of past transactions? Isn't that the correct statement of your proposition?

Mr. PLATT: I have stated it.

Mr. GLASGOW: Isn't that it?

Mr. PLATT: I have stated it.

Mr. GLASGOW: That is what I understand it to be. Of course, if he is a little touchy about restating it——

The COURT: The objection is upon the ground that the Interstate Commerce Commission cannot regulate past transactions. The answer is that they did not do that. If the objection is that they cannot award reparation then, the Supreme Court has passed on it.

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)

Mr. PLATT: I also object on the ground that the order and report would take from the Court its judicial power to determine the rules of law governing the proceedings in this case, especially the rule of damages applicable to the case, and, further, in fact, it would impose upon this Court as evidence in this case that which is not legal evidence, and, further, would impose upon the Court as findings of the Commission conclusions not based on the findings.

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)

100 Mr. PLATT: I also object on the further ground that the alleged findings of the Commission are invalid and unconstitutional, in that they have the effect of depriving the defendant of its constitutional right to a trial by jury.

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)

Mr. PLATT: I also object to the report of June 8th, 1911, because it contains no findings of fact, as required by the statute. It contains not a single finding of fact upon which reparation of award can be based, or which is material, or relevant, in a reparation suit.

Mr. GLASGOW: There are certain findings of the Commission in this case, if that point is made, which perhaps your Honor will have to guard in telling the jury what part of this report to consider, and I will prepare and submit to your Honor such a point for charge, striking out such points as are argumentative or historical, and confining the jury's consideration to such findings of fact as the Commission may make.

Mr. PLATT: This is offered in evidence as a whole. It is either admissible or it is inadmissible, and I challenge my friend to find the findings of fact in that report on which a reparation order of award can be based.

Mr. GLASGOW: Here are two of them.

The COURT: Just let me see what findings they made upon the award of reparation.

Mr. GLASGOW: In the first claim they say, "We are of opinion

and so hold that the complainants have sustained the allegation of unjust discrimination, under the second section of the act." That is on page 137. That is a finding of fact.

On page 162 they say, "After careful study of the defendant's exhibits relating to tonnage and cost of movement, as well as a painstaking analysis of defendant's voluminous exhibits respecting its past and present financial condition, we are of opinion and so find that the defendant's rates for the transportation of coal from the Wyoming region to Perth Amboy of \$1.55 per gross ton on prepared sizes, \$1.40 on pea coal and \$1.20 on buckwheat coal, are unreasonable, so far as they exceed \$1.40 on prepared sizes, \$1.30 on pea coal and \$1.15 on buckwheat."

The COURT: Then is there a calculation of the tonnage there?

Mr. GLASGOW: It all follows in the order of reparation.

(Objection overruled.)

(Exception noted for defendant by direction of the Court.)

Mr. PLATT: I also object, because the report contains many statements purporting to be statements of evidence on the hearing before the Interstate Commerce Commission, arguments, opinions and conclusions, which the statute does not purport to make admissible as prima facie evidence.

Mr. GLASGOW: In reply to that, I would suggest—and this is only a suggestion—that your Honor say that you will control the effect of this report by a proper charge to the jury, because there are certain statements of evidence, and statements of a historical character which I think, under the cases, the Court should control in submitting the case to the jury, and direct their attention to the facts formed in the report.

The COURT: Then your idea is simply to offer the report in evidence for the purpose of proving that there was an order made and all relevant material in support of that evidence?

102 Mr. GLASGOW: Yes, sir.

The COURT: The Court will, of course, indicate to the jury what of the report is relevant.

(Objection overruled.)

(Exception noted for defendant, by direction of the Court.)

Mr. PLATT: I would like to know whether Mr. Glasgow does offer the whole report or whether he does not offer the whole report.

Mr. GLASGOW: There cannot be any doubt about that. I have offered the report, and you are making your objections to it, and the Court has said that he will control it by such direction as he may give to the jury with respect to the matters contained therein.

Mr. PLATT: Do I understand that that is the position that the Court takes, and that that statement is correct.

The COURT: That is the position that the Court takes. It seems to me that unless that is done an Interstate Commerce Commission report could scarcely ever get before a jury.

Mr. PLATT: It never ought to be gotten before a jury, if your Honor please, except in so far as the statute says so.

The COURT: That is another question. We will not go into that now, whether it ought or ought not.



Mr. PLATT: I understand that is the question that he means to raise. Maybe your Honor's and my minds are not running together. The point I make is that the report contains a very different thing from that which the statute authorizes.

The COURT: If it does, that will be considered. You have  
103 your objection made, and an exception is noted, and we will consider it when we have time to look into it more carefully. You get the advantage of that, if what you say is correct, and that it has no right to go in.

Mr. PLATT: I also object on the further ground that the statements contained in the report, if held to be findings of fact, are so confused with other matter as not to be distinguishable or separable. (Objection overruled.)

(Exception noted for defendant by direction of the Court.)

Mr. PLATT: I also object on the further ground that the report has no bearing of competency in connection with an action for damages, because it does not set forth the alleged causes of action on which the award purports to be made up. In fact, the original report specifically reserves all such statements to a subsequent order.

The COURT: We will take a recess now until 2 o'clock.

At 1 o'clock P. M. the Court took a recess until 2 o'clock P. M.

2 P. M.

(Last objection read.)

Mr. GLASGOW: I do not understand that objection.

Mr. PLATT: Each one of these shipments constitutes in itself a separate cause of action that is here before the Court, and the report fails in any way to set those forth. The report makes no allusion at all to them—I am now referring to the original report—except to reserve them for a subsequent order, and there is no finding of  
fact as to any specific cause of action.

104 The COURT: What does the report say which has reference to reserving that for future orders?

Mr. PLATT: "We are further of opinion that reparation should be awarded upon basis of the rates herein found to be reasonable upon all shipments of coal by complainants from the Wyoming region to Perth Amboy since August 1, 1901. The amount of reparation which should be awarded under our finding in this case cannot be ascertained from the exhibits now on file, and such further proceeding will be had as may be necessary to determine the amount of money due to complainants." Then there is a subsequent hearing and a subsequent report on the subject of reparation.

The COURT: Is that in evidence?

Mr. GLASGOW: No, sir; it has not been offered yet. It follows this. The report is now offered as to the first claim, where unlawful discrimination was charged, and the Commission finds: "We are of the opinion and so hold that complainants have sustained the allegation of unjust discrimination under the second section of the act. Reparation, with interest from August 1, 1901, will be awarded on this account." Then as to the claim of unreasonable rates, the Commission finds that the rates were unreasonable, but "the amount

of reparation which should be awarded under our findings in this case cannot be ascertained from the exhibits now on file, and such further proceeding will be had as may be necessary to determine the amount of money due to complainants." Then we went before the Commission with a statement of the shipments, each shipment, the time that it was made, tabulated form of the interest on that shipment and the cost on each shipment, which had been gone over by defendant's counsel and agreed to as correct statement.

105 and then the Commission filed the report setting forth what is the amount of the reparation which they find, saying, "The exhibits showing details respecting the shipments upon which reparation is asked are too extensive to set forth in this report. But inasmuch as the accuracy of the figures in said exhibits respecting the shipments made, freight charges paid and reparation due, is conceded of record by defendant, we deem it unnecessary to make detailed findings respecting the numerous shipments involved. Orders will be issued in accordance with the findings herein announced."

The COURT: Is that in evidence?

Mr. GLASGOW: I am going to follow this first report with the second.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. PLATT: We make the further objection to the order now offered in evidence—that is, the order of June 8, 1911—on the ground that it is wholly irrelevant and immaterial. That is the order, if your Honor please, that fixes the future rate and which has no allusion in it at all to the reparation.

The COURT: You object to the order which fixes the future rate?

Mr. PLATT: Yes. That is what is offered.

The COURT: The order is offered for the purpose of proving the amount of reparation.

Mr. PLATT: It does not tend in any way to prove it. Perhaps your Honor has it a little confused. The order which fixes the future rates, which was entered in June, 1911, was the order which ordered the defendant to desist from charging the rates it had been 106 charging in the past, and directing it to put into effect the rates which the Commission found.

The COURT: That is part of the finding in the whole order?

Mr. PLATT: No, sir. There are findings——

The COURT: It is part of the report?

Mr. PLATT: No, sir; if your Honor please, the Commission made their report, which purports, I suppose, or which it is claimed, contains the findings. Then they made an order as to future rates. There is nothing in the statute that I know of that admits that in evidence.

The COURT: Mr. Glasgow, is the Commission's order fixing future rates in the same paper in which they order reparation?

Mr. GLASGOW: No, sir. It is an order of this kind——

The COURT: Have you offered that in evidence?

Mr. GLASGOW: I merely offer that in evidence to show that the Commission not only found the rates unreasonable, but did not rest

there, but carried it into an actual order that the rates should be decreased in accordance with this finding. In other words, the report that the Commission makes has no actual value, so far as decreasing the rates are concerned. It merely is *prima facie* evidence. Now I follow that with the order which directs the carrier to follow the finding of the Commission and reduce the rate.

The COURT: For what purpose? For the purpose of showing it is an unreasonable rate?

Mr. GLASGOW: Yes, sir; and, as a matter of fact, the Commission ordered them to reduce it, and I expect to follow that by showing they did reduce it.

107 Objection overruled. Exception noted for defendant by direction of the Court.

Mr. GLASGOW: I ask that the report of the Commission of June 8, 1911, together with the order thereto attached of June 8, 1911, in case No. 1180, be marked as plaintiff's exhibit No. 1.

(Papers marked Plaintiff's Exhibit No. 1, November 11, 1912.)

Mr. PLATT: This order which Mr. Glasgow offers comes certified under the date of June 8, 1912, which is a clerical error. June 8, 1911, is right, and I concede that.

Mr. GLASGOW: I offer now, if your Honor please, the report of the Interstate Commerce Commission in case No. 1180 Henry E. Meeker and Caroline H. Meeker co-partners, trading as Meeker & Company, against the Lehigh Valley Railroad Company, submitted February 27, 1912; decided May 7, 1912; being supplemental report of the Commission, together with the order of the Commission entered on the 7th day of May, 1912, in the same case, No. 1180, in which the amount of reparation was fixed and awarded.

Mr. PLATT: I have certain objections to make to those. Some of those objections are the same, and I assume, of course, that they will take the same course.

The COURT: Do all those objections which you made to the first report apply to these other two reports?

Mr. PLATT: Not all of them, no, sir. We object to the admission of this supplemental report on the following grounds:

That the statute under which the supplemental report is offered in evidence, Interstate Commerce act, Section 16, is unconstitutional in that it deprives the defendant of due process of law.

108 Objection overruled. Exception noted for defendant by direction of the Court.

Mr. PLATT: That the report is invalid because on its face it purports to regulate commerce which was completed before the time when the order was made, and which, therefore, was not subject to regulation.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. PLATT: That the alleged findings of the Commission are invalid and unconstitutional in that they have the effect to deprive the defendant of its constitutional right of a trial by jury.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. PLATT: That the findings take from the Court its judicial power to determine the rules of law governing the proceedings in this case, especially the rule of damages applicable to the case, and further, in effect, impose upon this Court as evidence in this case that which is not legal evidence, and further to impose upon this Court as findings of the Commission conclusions not based on findings.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. PLATT: That the supplemental report of May 7, 1912, is inadmissible as a whole (1) because it contains no findings of fact as required by the statute; it contains not a single finding upon which a reparation or award can be based or which is material or relevant in a reparation suit.

The COURT: As I understand, it is simply a fixing of the amount upon a statement which was agreed to by both sides. Is that correct?

Mr. GLASGOW: Yes, sir.

109 Mr. PLATT: It states a lot of conclusions. I do not think there is a finding of fact in it.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. PLATT: Second, because it contains incorrect statements as to the contents of the original report, the original report being the best evidence, if the subject matter of such statements is relevant or material to the issues.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. PLATT: That the report has no validity or effect as evidence in this action for damages, because it does not set forth the alleged causes of action of which the award purports to be made up. The supplemental report simply gives as a conclusion the total tonnage and total freight payments, and does not set forth any single cause of action.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. PLATT: That it appears on the face of the supplemental report that the total amount found by the Commission to be the amount of the alleged damages was the sum of several amounts claimed on several separate shipments of coal between November 1, 1900, and July 17, 1907; that each of such shipments is the basis of a separate cause of action, and the report is inadmissible as not specifying as to each the amount awarded by the Commission; that the report fails to state as to each shipment the amount found due by the Interstate Commerce Commission, and, therefore, the report is not, under Section 16, prima facie evidence as to any of the causes of action here sued upon.

110 Objection overruled. Exception noted for defendant by direction of the Court.

Mr. PLATT: We object to so much of the report as relates to the period prior to June 29, 1906, on the ground that the Commission

has no jurisdiction. Section 16 provided that claims accruing prior to June 29, 1906, the date of the passage of the act, must be made the subject of a proceeding before the Commission within one year of the passage of the act; the complaint having been filed more than one year after the passage of the act, to wit, July 17, 1907.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. PLATT: We object to so much of the report as relates to the period prior to July 17, 1905, on the ground that the Commission had no jurisdiction. Section 16 providing that claims accruing within two years prior to the passage of the act might be filed with the Commission within a year after the passage of the act, since the complaint was not filed until July 17, 1907, or more than one year after the passage of the act; the commission has no jurisdiction of claims accruing prior to the two-year period, or prior to July 17, 1905.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. PLATT: We object to so much of the report as relates to the period prior to August 28, 1904, on the ground that the Commission had no jurisdiction.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. PLATT: We object to so much of the report as relates  
111 to the period prior to June 29, 1904, on the ground that the Commission had no jurisdiction.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. PLATT: We object to that part of the report which relates to shipments prior to September 3, 1906, on the ground that all claims accruing prior to that date are barred by the Pennsylvania statute of limitations.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. PLATT: We object to that part of the report which relates to shipments prior to July 17, 1901, on the ground that all claims accruing prior to that date are barred by the Pennsylvania statute of limitations.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. PLATT: We object to that part of the report which relates to shipments prior to July 17, 1902, on the ground that all claims prior to that date are barred by Section 1047 of the revised statutes of the United States.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. PLATT: We object to the report because it shows on its face that the causes of action accrued more than five years prior to September 3, 1912, the date this suit was brought, and are hence barred by Section 1047, of the Revised Statutes.

Objection overruled. Exception noted for defendant by direction of the Court.

112 Mr. PLATT: We object to that part of the report which relates to shipments between November 1, 1900, and August 1, 1901, as inadmissible in evidence, because the Commission was without power to make such report, for the reason that the causes of action upon said shipments were barred by the Federal Five Years' Statute, Section 1047, Revised Statutes, prior to the time when the proceedings were commenced in the Commission, the same being for discrimination under Section 2, of the Interstate Commerce Act, and, therefore, being penal causes of action.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. PLATT: We object to the admission of the supplemental report further because it fails to state what part of the amount specified was on shipments made within the period of limitation applicable, and what part was awarded on shipments occurring before the period of limitation applicable, and, therefore, fails to show what transactions were within the power of the Commission.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. PLATT: We further object to the admission of the report now offered because it contains statements purporting to be statements of evidence on the hearing before the Interstate Commerce Commission, arguments, opinions and conclusions which the statute does not purport to make admissible as prima facie evidence.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. PLATT: We object to the order now offered in evidence on the ground that it is not competent as evidence.

Objection overruled. Exception noted for defendant by direction of the Court.

113 Mr. PLATT: We object to the order now offered on the ground that the statute under which the order is offered in evidence, the Interstate Commerce act, Section 16, is unconstitutional in that it deprives the defendant of due process of law, it not being within the power of Congress to provide, by legislative enactment, that the Interstate Commerce Commission can make findings upon which there may be a claim for reparation of damages to a petitioner before that body, and then provide that, on the trial of a suit to recover such alleged damages, the finding and order of the Commission shall be prima facie evidence of the facts therein stated.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. PLATT: We object further to the order on the ground that it is invalid and unconstitutional in that it has the effect to deprive the defendant of its constitutional right of a trial by jury.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. PLATT: We object further on the ground that the order takes



from the Court its judicial powers to determine the rules of law governing the proceedings in this case, especially the rule of damages applicable to the case, and further in effect imposes upon this Court as evidence in this case that which is not legal evidence and further to impose upon this Court as findings of the Commission conclusions not based on findings.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. PLATT: We object further to the order on the ground that it is invalid because on its face it purports to regulate commerce which was completed before the time when the order was made and which, therefore, was not subject to regulation at that time.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. PLATT: We further object to the order on the ground that the award made in the reparation order is not based on the findings of fact required by the Interstate Commerce act, as the act requires that, in case damages are awarded, such report shall include the findings of fact on which the award is made, and the report contains no finding of fact to support a conclusion that any of the rates charged the plaintiff prior to July 17, 1907, were unreasonable.

The COURT: This is a supplemental act, and both acts go together. The supplemental act is the entry of the amount which was agreed upon, as I understand.

Mr. PLATT: The only thing that was agreed upon, or appears to be agreed upon, was that the figures contained were correctly made up in the schedule that was referred to.

The COURT: That is what I understand.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. PLATT: We object to the admission of the order on the further ground that it appears on the face of the order that the total amount ordered by the Interstate Commerce Commission to be paid was the sum of several amounts claimed on several separate shipments of coal between November 1, 1900, and July 17, 1907; that each such shipment is the basis of a separate cause of action and the order is inadmissible as not specifying as to each the amount awarded by the Commission; that the order fails to state as to each shipment the amount found due by the Interstate Commerce Commission, and, therefore, the order is not, under Section 16, prima facie evidence as to any of the causes of action here sued upon.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. PLATT: I wish to make each and all of the same objections to the order that is now offered in evidence that I have just made previously as to the report now offered in evidence, relating to matters of limitation. I think perhaps, with the permission of the Court, if I may make those objections in that way, without reading them in detail, it will save the time of the Court.

The COURT: You want these objections to apply to what?

Mr. PLATT: I want the objections that I made to the supplemental report, which is now offered in evidence, so far as there were objections arising out of statutes of limitation, to apply also as objections to the order that is now offered in evidence.

The COURT: Let it be understood that they shall apply as suggested by counsel, without reading them, and that as to each of them there shall be the same ruling and an exception for the defendant.

Mr. PLATT: As to the order, I wish further to make the general objection that it is irrelevant and immaterial.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. GLASGOW: I offer this report and order, and ask that  
116 it be marked Plaintiff's Exhibit 2; that is, the supplemental report and order directing reparation.

(Papers marked Plaintiff's Exhibit 2, November 11, 1912.)

Mr. GLASGOW: I offer the order of the Interstate Commerce Commission, dated June 15, 1912, case No. 1180, Henry E. Meeker and Caroline H. Meeker, co-partners, trading as Meeker & Company, against Lehigh Valley Railroad Company, supplemental order. The only difference, I think, there is between this order and the former order offered is that it changes the date from the 15th day of July, 1912, upon which payment was required in the former order, to August 1, 1912; in other words, extending the time of payment as required of the defendant until August 1st.

Mr. PLATT: We make each and all of the same objections to the admission of this order that we did to the last previous order, which has been marked Plaintiff's Exhibit 2.

The COURT: Let all the objections apply to this order. They are overruled, and an exception granted the defendant as to each.

(Report offered marked Plaintiff's Exhibit 3, November 11, 1912.)

Mr. GLASGOW: It was agreed by counsel for the defendant that the reports and orders which I have offered in evidence as Plaintiff's Exhibits 1, 2 and 3 were duly served upon the Lehigh Valley Railroad Company. That was admitted, as I understand, by your letter.

Mr. PLATT: Yes.

Mr. GLASGOW: I would like that to appear of record, that counsel admit the service.

Mr. PLATT: We so admit.

117 Mr. GLASGOW: Counsel for the defendant admit that the Exhibit No. 1, being report and order of the Interstate Commerce Commission, was duly served upon it upon July 1, 1911?

Mr. PLATT: Yes, I admit that.

Mr. GLASGOW: That Exhibit 2 was duly served upon it upon May 25, 1912?

Mr. PLATT: Yes, I admit that.

Mr. GLASGOW: And that Exhibit No. 3 was duly served upon the defendant upon June 27, 1912?

Mr. PLATT: I admit that.

(Examination of witness resumed.)

By Mr. GLASGOW:

Q. You are the same Henry E. Meeker who was a party to this complaint before the Interstate Commerce Commission?

A. Yes.

Q. Did your firm and yourself as surviving partner, during the period covered by the complaint, from August 1, 1901, to July 17, 1907, pay to the Lehigh Valley Railway Company the published rates which were found by the Commission to be unreasonable?

A. I did.

Mr. PLATT: I object, if your Honor please, and move to strike that out. The question assumes something which was not found by the Commission. There is not any finding anywhere that the amounts that he paid were found to be unreasonable. I object to the last part, "which were found to be unreasonable."

Mr. GLASGOW: Strike out the question.

By Mr. GLASGOW:

Q. Will you kindly tell us what rates you paid on coal, 118 you and your firm, from August 1, 1901, to July 17, 1907, on shipments of coal from the Wyoming region to Perth Amboy, stating the rates on the several sizes?

A. On prepared coal I paid \$1.55 per ton.

Q. Per gross ton?

A. Per gross ton. On pea coal I paid \$1.40 per gross ton.

Q. Buckwheat?

A. Buckwheat coal I paid \$1.25 part of the time and part of the time \$1.20.

Q. Since the order of the Interstate Commerce Commission went into effect what rates have you paid?

Objected to as irrelevant.

Objection overruled. Exception noted for defendant by direction of the Court.

A. \$1.40 prepared.

Q. These gentlemen do not know as much about coal as you do. Tell us what you mean.

A. On prepared sizes of coal which means broken, egg, stove and chestnut sizes, \$1.40 has been the rate from the Wyoming Region to Perth Amboy. On pea size \$1.30 and on buckwheat \$1.15.

Q. Between the first day of August, 1901 and the 17th day of July, 1907, can you state what amount of coal of the sizes that you have mentioned was shipped by you or your firm from the Wyoming region to Perth Amboy?

Objected to as calling for a conclusion. The question is what shipments he made and he should specify the shipments that he made.

Objection overruled. Exception noted for defendant by direction of the Court.

By the COURT:

Q. Can you state the amount?

A. Yes, I can.

119 By Mr. GLASGOW:

Q. Please state it.

Objected to as calling for a conclusion.

The COURT: Where did he get it from?

By Mr. GLASGOW:

Q. Where did you get that statement from?

A. From the statement made up in my office and checked by the Lehigh Valley officials.

Q. Did you go over it with the Lehigh Valley officials?

A. I did.

Q. Did they approve it or disapprove it?

A. They approved it, as far as I have it here.

Q. Approved it as correct?

A. Approved it correct.

By Mr. PLATT:

Q. You mean that, as appears in the statement that you have in your hands, they approved it?

A. Yes.

Mr. PLATT: It is the statement that he has in his hand, the detailed amounts, that is admissible, and that is all.

The COURT: He is going to state from that statement what the amount is. The statement will not speak to the jury itself, will it?

Mr. PLATT: It does state each separate cause of action there is here.

Objection overruled. Exception noted for defendant by direction of the Court.

By the COURT:

Q. Go ahead, tell us what the amount is.

A. Prepared sizes, 246,870 tons 15 hundredweight. Pea coal, 106,051 tons 9 hundredweight. Buckwheat coal, 87,250 tons.

By Mr. GLASGOW:

120 Q. Were all of those shipments made under the rates you have mentioned of \$1.55 on prepared sizes, \$1.40 on pea coal and \$1.25 and \$1.20 on buckwheat?

A. Yes.

Q. Have you calculated what would be the difference between the amounts which you paid and the amounts which would have been paid if you had been charged \$1.40 on prepared sizes, \$1.30 on pea coal and \$1.15 on buckwheat?

A. Yes.

Q. Will you please state what it is?

Mr. PLATT: I object to that as incompetent. It is a conclusion, and moreover it does not necessarily constitute the measure of damage in this case.

Objection overruled. Exception noted for defendant by direction of the Court.

Q. Please state it.

Objected to. Objection overruled and exception noted for defendant by direction of the Court.

A. \$58,236.45.

Q. Did you calculate the interest on that from the several dates of payments and shipments up to the 1st day of September, 1911?

A. Yes.

Q. What did that amount to?

A. \$27,750.64.

Q. Has any part of that excess been paid to you by the Lehigh Valley Railroad Company.

A. No.

Q. Or the interest on it?

A. No.

Q. Has any part of the \$11,009.33 or the interest on it been paid to you?

A. No, sir.

The COURT: Are there any reports from the Interstate Commerce Commission as to that last report?

121 Mr. GLASGOW: It is in the ones that have been offered. I just wanted to identify the fact that the payments were made by his firm.

Cross-examination.

By Mr. PLATT:

Q. Will you let me take the paper you have been reading from? (Paper handed to Mr. Platt.) You have been testifying from a document which you held in your hand while you testified and which I now have here. What is this document?

A. That is a statement showing the shipments each week since August 1, 1901, of the different sizes of coal from the Wyoming region consigned to us at Perth Amboy?

Q. That is a statement that was prepared in your office?

A. It was prepared from the Lehigh Valley bills, which we had in our office.

Q. Prepared from the Lehigh Valley bills in your office.

A. Yes.

Q. And when you say that it relates to the period after August 1, 1901, you mean the big sheets?

A. Those are the large sheets, yes.

Q. What are the small sheets?

A. The small sheets are from November, 1900, to August, 1901, and that statement there is made up based on the monthly shipments.

Q. Is that a copy of the document that was prepared and used before the Interstate Commerce Commission?

A. It is one of the copies that was made at that time, yes. I do not know but this is the original.

Q. The order of May 7, 1912, which has been offered in evidence refers to an itemized statement known as "Complainant's Exhibit 2" before the Commission. Is this document that we are referring to now that Exhibit 2 that is referred to in that order?

122 A. I could not say.

Q. You were present, were you not?

A. I do not know what number it is before the Commission. I have no recollection of that.

Q. Will you look at the order and see if you have any doubt as to whether that is the statement that was before the Commission and which is the statement referred to in that order?

A. Those evidently are the large sheets of paper and not the small ones.

Q. The Exhibit 2 referred to in the order refers to the large sheets of paper that we have been talking about?

A. All the large ones excepting these back to here. That is the other claim.

Q. All of the large sheets bearing the dates in the first column from August 6, 1901 to July 2, 1907, are the sheets which constituted the Exhibit 2 referred to in the order?

A. Yes.

Mr. PLATT: Will you offer that, Mr. Glasgow?

Mr. GLASGOW: I will let you offer it.

Mr. PLATT: I will have it marked for identification.

Mr. GLASGOW: When your time comes, you offer it in evidence. I do not want to encumber the record. I have no objection to it. We will let you have this copy, if you want to introduce it.

Mr. PLATT: I think, if your Honor please, I will have that marked for identification, and then there will be no question about that being the document he has on the record.

Mr. GLASGOW: If you are going to raise objections of that kind, I will say that I have not offered it, Mr. Platt has a copy of it, and

123 I will let it rest with the witness. Out of courtesy I offered to give it to him if he wanted to offer it, but I do not care about my record being complicated by his marking exhibit he may want to offer.

Mr. PLATT: I think I have a right to have it marked for identification so we can have it appear upon the record, when I do offer it, that it is the document that the witness was referring to when he was testifying.

The COURT: I think he has a right to do that.

Mr. GLASGOW: He has his own copy.

By Mr. PLATT:

Q. Is the document that I now show you, the document which belongs to me, the same as the one you have been referring to?



The COURT: I think they are entitled to have this documentary evidence identified. The rule is when you call an expert to testify without books that you must have your documents here and they have a right to have those documents identified. What is all the trouble about?

Mr. GLASGOW: The only trouble was that I had given a copy to Mr. Platt and I wanted him to use his and let us keep ours.

By Mr. PLATT:

Q. This copy is the same, is it?

A. Yes, sir; as far as I can see.

Q. This is a carbon copy of the same document which you furnished to us at the time?

A. Yes.

Mr. PLATT: I will have that marked instead of the other.

(Document marked Defendant's Exhibit A for identification.)

124 By Mr. PLATT:

Q. Now take the smaller sheets of the document which you have been looking at, which you say are those which relate to the discrimination case?

A. Yes.

Q. These that I hand you now are a duplicate of those same sheets which were furnished by you to the defendant at the same time?

A. Yes.

(Sheets marked Defendant's Exhibit B for identification.)

By Mr. PLATT:

Q. When you say these sheets were approved by the Lehigh Valley, you mean nothing more, do you, than they were turned over to the Lehigh Valley Accounting Department for the purpose of checking up the figures in them?

A. That is all.

Q. Look at the column in the large sheets headed "Time." You see there is, under the head of "Years and Days" a date and a number of days. What does that mean? Take for instance the item "8-8-10-23." What does that mean?

A. It means the 8th day of the 8th month. Let me see that.

Q. Ten years and 23 days refers to the elapsed time on which the interest is calculated?

A. Yes.

Q. What does the eighth day of the eighth month mean?

A. I think that means the date that the draft actually was presented. The date of your bill is August 6th.

Q. August 6th was the date of the shipment, was it not?

A. No, excuse me. That was the date of your invoice.

125 That August 6th bill covered shipments of the previous week. That was the date of your draft. Now the draft was presented to us on August 8th and we, therefore, figured the interest from the date on which we paid your bill.

Q. In other words, the 8-8 is the date you paid our draft for the freight?

A. I think so.

Q. The Lehigh Valley's draft on you?

A. Yes.

Q. What you have said in regard to this first case would apply to all of the subsequent items?

A. Yes, I think so. That is as I recollect it.

Redirect examination.

By Mr. GLASGOW:

Q. These two documents which Mr. Platt has had identified, as I understood you, were submitted to the Lehigh Valley Railroad. What department of the road?

A. To the Auditing Department.

Q. Do you recall to whom it was submitted? The name of the man?

A. Mr. Miller, and Mr. Grier had them, too, at one time.

Q. Was then the statement gone over as to the amount of shipments, the dates of the payments of freight, the calculations of interest, the difference between the amount of freight paid and the amount under the finding of the Commission and the balance shown on the total of the statement?

A. Yes.

Q. That was submitted to him and he went over it; what did he say about the statement?

A. He said there were several—on the original statement there were corrections made, in both statements. They made a statement and we made a statement, or rather they made a statement and corrected our statement, and they made some mistakes and 126 we went back again and we finally got together on this statement.

Q. What do you mean by getting together?

A. I mean by that we got the exactly correct figures and they show right here on this statement.

Q. What did they say about it?

A. They say these figures are absolutely correct, the same as we do.

By Mr. PLATT:

Q. Those are the figures that, after they were checked back and forth, were found by you to be the statement of the amount on the basis that you had presented it? In other words, they simply checked over your figures and corrected details of your figures?

A. Yes, and we corrected the details of some of theirs.

Q. But all the subsequent work between Mr. Miller and yourself or your assistant was as to details of correction of figures?

A. Yes.

By Mr. GLASGOW:

Q. As I understand you, that statement was agreed upon between

you and the representative of the Lehigh Valley Railroad Company as to the amount of coal shipped by you, the dates of the payments of freight by you, the amount of the payments of freight, the interest upon the excess payment over and above the amount of the rate found by the Commission?

A. Absolutely.

Q. And they found that to be correct?

A. Absolutely.

Q. And agreed to it?

A. Yes.

Mr. GLASGOW: I want this joint resolution, of June 30, 1906, of Congress, to appear on the record so that it will be convenient for your Honor to consider it: "The Act entitled 'An Act to amend an Act entitled "An Act to Regulate Commerce," approved February 4, 1887, and all its Acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission' shall take effect and be in force sixty days after its approval by the President of the United States."

Mr. PLATT: Add the words "approved June 30, 1906."

Mr. GLASGOW: I agree it may be stated "Approved June 30, 1906." The statement above made may be corrected in accordance with the published statutes, if there is anything wrongly stated in it.

Mr. PLATT: I think it will add to the convenience if I give you the two references to the statutes at large, your Honor.

Mr. GLASGOW: Do not let us argue this case.

Mr. PLATT: If you are going to put that much in, I should think it would be proper to put the references in, because these printed books are quite incomplete that have been gotten out by various people containing statutes. The references are 34th Statutes at Large, p. 595, and 34th Statute at Large, p. 838.

The COURT: What is there about the approval of that joint resolution? As I understand, the Hepburn Act was passed on the 29th of June?

Mr. GLASGOW: Yes.

The COURT: After they passed it and it was signed by the President, then they passed this joint resolution the next day?

Mr. GLASGOW: Postponing the effective date of it.

The COURT: And that was signed by the President?

128 Mr. GLASGOW: Yes, sir.

Mr. PLATT: It had the same effect, as I understand it, although it was called a joint resolution, as an Act of Congress. Nothing could be done to amend or change the Act of Congress of the 29th, unless it was acted on by both Houses of Congress and approved by the President.

By Mr. GLASGOW:

Q. Mr. Meeker, can you state to the jury when the arrangement or agreement by which the average adjustment of rates on the 65 per cent. basis instead of 60 was made effective by the Lehigh Valley Railroad Company?

Mr. PLATT: I object. He has not testified there was any such

agreement. Furthermore, he has not shown he is competent in any way to testify.

Mr. GLASGOW: I am going to find out how he does know, if he does know.

The COURT: Find out if he knows.

By Mr. GLASGOW:

Q. Do you know?

A. Yes.

Q. How do you know?

A. I had a notice from the coal freight agent of the Lehigh Valley Railroad Company.

Q. Did you ever hear the Auditor of the Company say anything about it, when it became effective?

(Not answered.)

Q. What date did that become effective?

Objected to as a conclusion. Objection overruled. Exception noted for defendant by direction of the Court.

A. August 1, 1901.

Q. For what period of time did it then apply, the 65 per cent. basis?

129 Same objection. Objection overruled. Exception noted for defendant by direction of the Court.

A. From November 1, 1900, to August 1, 1901.

Plaintiff Rests.

*Defendant's Evidence.*

Mr. PLATT: I have no desire to make an opening statement. I offer in evidence the two documents that were marked Defendant's Exhibit A for identification and Defendant's Exhibit B for identification. Let them be marked Defendant's Exhibit A and Defendant's Exhibit B.

(Papers marked accordingly and admitted in evidence.)

GEORGE W. FIELD, having been duly sworn, was examined as follows:

By Mr. PLATT:

Q. Where do you reside?

A. New York City.

Q. What is your business?

A. I am a law clerk.

Q. Where?

A. At New York City, 2 Rector Street.

Q. In the office of O'Brien, Boardman & Platt, counsel in this case?

A. Yes, sir.

Q. Have you assisted in the preparation and upon the hearings of this case before the Interstate Commerce Commission and in this court?

130 A. Yes, sir.

Q. Have you made certain calculations from Exhibits A and B, which have just been offered in evidence, dividing up those shipments as between the different dates to which it has been claimed that the different statutes of limitation apply?

A. I made the calculations on Exhibit B, but those on Exhibit A were made under my instructions.

Q. Take the calculations that you made under Exhibit B and state, if you please, what part of those under Exhibit B were on shipments prior to July 17, 1901.

A. Of the total amount appearing as the basis of the claim on Exhibit B, for the period between Nov. 1, 1900, and August 1, 1901, that total being \$11,009.33, \$795.64 of that amount is based upon shipments which were made subsequent to July 17, 1901, the balance representing the amount based upon shipments prior to July 17, 1901.

Q. Will you please state on the record the amount on shipments prior to July 17, 1901?

A. \$10,213.69.

Q. Have you figured the interest on the part prior to July 17, 1901?

A. Of the interest item appearing on Exhibit B, being the interest on \$11,009.33 to January 1, 1912, a total of \$6,886.33, of that amount \$497.67 constitutes the interest on the smaller amount that I just gave before, namely, \$795.64. Therefore, the interest applicable against the \$10,213.69 is the difference between \$6,886.33 and \$497.67, or \$6,388.66.

Q. Have you made certain divisions of Exhibit A, being the large sheet?

A. Yes, sir.

Q. Are they contained in the paper that I now hand you?

A. Yes, sir.

Q. And those are correct calculations?

131 A. Yes, sir.

Q. This is a statement, as I understand it, made up to show the amounts of principal and interest, with reference to the various claims that have been made here to-day under the different statutes of limitation?

A. Yes, sir.

By Mr. GLASGOW:

Q. How did you get, as to that Exhibit B, a division as of July 17th?

A. I said I had that made up; Mr. Merrill, who is here, made the division from the records.

Q. I thought you were testifying as to this Exhibit B.

A. I distinguished. I said that as to Exhibit A the figures I made up myself. As to Exhibit B, I had them made up. Mr. Merrill made them up for me.

Q. Where are the figures he made up?

A. Mr. Merrill is here. They are on the books of the company here at the office in Philadelphia. I was careful to state that. I thought you heard me.

Q. You did not see the books of the company at all?

A. Oh, no. I said not.

By Mr. PLATT:

Q. That is, as to the \$11,009 item, you had that made up by Mr. Merrill?

A. Yes, sir.

Q. But the other, the big sheet, you made that calculation up which appears on this paper now in Mr. Glasgow's hands? You made that up yourself?

A. Yes, sir.

By Mr. GLASGOW:

Q. Then, as I understand it, you made no calculation from the books as to this Exhibit B at all?

A. Referring to the \$11,000?

Q. Yes.

A. Oh, no. I so stated, too.

132 Mr. GLASGOW: Of course, I cannot follow these calculations now. I have no objection to the paper going in. Of course, if we discover any error in it, I ask permission to call attention to it hereafter.

Mr. PLATT: There is no trouble about that. Mr. Meeker can check it all up, and if there is any error in it, Mr. Glasgow and I will have no trouble in fixing it up. It is a mere calculation from this document.

I offer in evidence the paper which Mr. Field has just referred to as having been made up by himself.

The paper offered, marked Defendant's Exhibit C, is as follows:



*"Excessive Charge Claim."*

Limitation.	Principal.	Interest to Sept. 1, 1911.	Interest to Aug. 1, 1912.	Total.
Sept. 3, 1907 (5-yr. penalty. U. S. Statute) :				
Claim ....	58,236.45	27,750.64	3,203.00	89,190.09
Barred ...	58,236.45	27,750.64	3,203.00	89,190.09
Balance....	0	0	0	0
Sept. 3, 1906 (6-yr. Penn. Statute) :				
Claim ....	58,236.45	27,750.64	3,203.00	89,190.09
Barred ...	54,383.15	26,741.53	2,991.07	.....
Balance....	3,853.30	1,009.11	211.93	5,074.34
June 29, 1906 (Passage of Act) :				
Claim ....	58,236.45	27,750.64	3,203.00	89,190.09
Barred ...	53,554.78	26,488.39	2,945.51	.....
Balance....	4,681.67	1,272.25	257.49	6,211.41
133				
July 17, 1905. 2 years before filing:				
Claim ....	58,236.45	27,750.64	3,203.00	89,190.09
Barred ....	46,766.90	24,171.61	2,572.18	.....
Balance....	11,469.55	3,579.03	630.82	15,679.40
Aug. 28, 1904 (2 years before effective date) :				
Claim ....	58,236.45	27,750.64	3,203.00	89,190.09
Barred ....	42,738.61	22,594.05	2,350.62	.....
Balance....	15,497.84	5,156.59	852.38	21,506.81
June 29, 1904 (2 years before passage) :				
Claim ....	58,236.45	27,750.64	3,203.00	89,190.09
Barred ....	42,401.53	22,449.86	2,332.08	.....
Balance....	15,834.92	5,300.78	870.92	22,006.62
July 17, 1902 (5 years before filing U. S. Penalty Statute) :				
Claim ....	58,236.45	27,750.64	3,203.00	89,190.09
Barred ....	17,790.24	10,305.72	978.46	.....
Balance....	40,446.21	17,444.92	2,224.54	60,115.67
Aug. 31, 1901 (U. S. 5-yr. Statute vs. Discrimination Claim only) :				
Claim ....	58,236.45	27,750.64	3,203.00	89,190.09
Barred ....	0	0	0	0
Balance....	58,236.45	27,750.64	3,203.00	89,190.09

134 The COURT: Suppose Mr. Field just gives his conclusions from that paper, to give us an idea.

The WITNESS: I can give you five results.

Mr. PLATT: I suppose what the Court desires is to have the paper explained, so it is perfectly plain on the record.

The COURT: Yes; to show what figuration he is making, what statutes of limitation you have raised here. There are a number of statutes.

The WITNESS: The first item on this sheet refers to the five-year limitation under the United States statute; that is to say, five years prior to the date of bringing the suit, which would bring it back to September 3, 1907. If all claims prior to that date are barred, the recovery would be zero, because that bars all of the causes of action in suit. Taking the next statute, six years under the Pennsylvania statute, going back to September 3, 1906, the Pennsylvania six-year statute, if applied, would bar all amounts sued for with the exception of \$5,074.34. That includes interest.

By Mr. GLASGOW:

Q. Will you state that again, please?

A. If the Pennsylvania statute, six years from the date the suit was filed—

Q. What suit?

A. This suit was filed.

By the COURT:

Q. In this Court?

A. In this Court; yes, sir—the result would be that it would cut all but \$5,074.34. These totals that I am giving you, your Honor, include the interest up to August 1, 1912, the petition having brought the interest up to that date. The third item refers to the assumption that all claims prior to June 29, 1906, which is the date of 135 the Hepburn act, are barred. If that were the case, then everything would be barred except \$6,211.41, which includes interest up to August 1, 1912. The next item refers to the assumption that claims two years prior to the filing of the complaint before the Commission are barred; in other words, that all claims are barred prior to July 17, 1905, in which case the recovery would be limited to \$15,679.40, plus whatever interest would accrue after August 1, 1912. The next item refers to a limitation applying two years before the effective date of the Hepburn act, bringing the limitation back to August 28, 1904, in which case the recovery would be limited to \$21,506.81, with whatever interest accrues after August 1, 1912. The next item refers to a limitation two years before the passage of the act—that is to say, as of June 29, 1904, which would limit the recovery to \$22,006.62, with whatever interest accrued after August 1, 1912. The next item refers to five years before the complaint was filed before the Commission, bringing it back to July 17, 1902, which would bar everything excepting \$60,115.67, plus interest from August 1, 1912. The last item assumes that the United States five-year statute bars out the discrimination claim only; in other words, that the \$11,000 discrimination item is barred by the

five-year statute, which would leave in suit the amount of the reparation cause; that is, the amounts referred to between August 1, 1901, and July 17, 1907, or \$89,190.09.

Cross-examination.

By Mr. GLASGOW:

Q. Suppose you go a little bit further. If the statute of limitations does not apply to the \$11,000 claim referred to—that is, between November 1, 1900, and August 1, 1901—and if the limitation on the filing of the petition is one year from August 28, 1906, and the petition was filed on July 17, 1907, then the amount of the claim which would be recoverable, as far as the statutes of limitations are concerned, is the amount stated in the plaintiff's declaration, is it not?

A. I am afraid I do not follow you.

Q. I just want you to follow your own statement a little bit further. If the \$11,009 claim between November 1, 1900, and August 1, 1901, is not barred by the statute of limitations, and if the plaintiff's claim between August 1, 1901, and July 17, 1907, is not barred by the statute of limitations to which you have referred, then the amount of the plaintiff's claim is correctly stated in the statement of claim, is it not?

A. I can state that a comparison with the petition, a careful comparison with the Exhibits A and B, shows that you have correctly transcribed the items into the petition.

Q. And, so far as the statutes of limitations are concerned, if they are not applied to either of the claims that you have referred to, the petition correctly states the plaintiff's claim?

A. I do not want to answer a question like that.

Mr. PLATT: I object to it. It is asking the witness to argue the case. The witness is put on for the purpose of making certain calculations.

Mr. GLASGOW: He has stated his side of the claim in case the statute of limitations is applied. Now I just want him to state the other side of it.

By Mr. GLASGOW:

Q. In case the statute is not applied, so far as the statute of limitations is concerned, the plaintiff's claim is stated correctly, is it not?

Mr. PLATT: I object to that, on the ground that it is asking the witness for a conclusion, and it is not cross-examination.

The COURT: In his statement as to what effect the statute would have upon your claim in the various cases insisted upon by the defendant, he does not admit that your statement of claim is right. He is simply working out what he says would be the effect of the statute on what you claim. You now have a right to ask him, however, whether or not you have stated your claim correctly, if the statute does not bar you.

Mr. GLASGOW: That is what I have asked him.

By Mr. GLASGOW:

Q. Have I stated correctly in this petition the orders of the Commission, if it is not barred by the statute of limitations?

Mr. PLATT: I object. He has a right to ask him to state the amounts stated in his petition, but when he asks the broad question as to whether he has stated the orders and rulings of the Commissioners correctly, that is asking him to interpret a document that is before the Court.

The COURT: No; not if he has examined into it or has seen it is stated correctly. He is a competent man, a competent accountant, and if he sees the figures are stated correctly, he can say so.

Objection overruled, and exception noted for defendant by direction of the Court.

A. The figures in the order, so far as they are applicable, the figures in your petition and the figures in Exhibits A and B, in so far as they purport to correspond, are correctly transcribed one from the other. They are all correct.

By Mr. GLASGOW:

Q. That is not the question I asked you. I asked you if this petition does not correctly state the figures which the Commission has in its order as to reparation, if the plaintiff's claim is not barred by any statute of limitations?

138 A. They correctly state the figures, whether it is barred or not. It is simply a question of figures.

Defendant Rests.

Testimony Closed.

The Court requested that Exhibits 1, 2 and 3 be read to the jury.

Mr. Glasgow read to the jury what he stated to be material portions of said exhibits.

During argument on defendant's points for charge, the following statements were made:

Mr. GLASGOW: The important thing in this report, in the first report, was that the Commission, after a year and a half of consideration, or two years' consideration, of this case, found that the rates were unreasonable, and then they made a supplemental order, after another hearing——

The COURT: They had it before them from 1907 to 1911?

Mr. GLASGOW: Exactly; they had it for four years, and they took all kinds of evidence on it.

Mr. PLATT: There was no evidence taken covering this period. (August 1, 1901, to July 17, 1907.)

Mr. GLASGOW: Yes, there was, Mr. Platt. I had evidence tending to prove the cost of transportation in 1902, 1903, 1904, 1905, all the way along up, and you objected to it on the ground that the Commission could not order rates for the future on evidence of what the cost was in the past.

Mr. PLATT: I would like to take exception to those statements being made before the jury.

Mr. GLASGOW: You should not draw me into it. I will withdraw it, if you do not want it. That is the situation. Here the

139 Commission were considering a concrete case covering unreasonable rates from that period, August 1, 1901, and, after considering it, they found that the rates were unreasonable.

The COURT: August 1, 1901, down to when?

Mr. GLASGOW: 1907, July 17th. Then they find that the rates are unreasonable, in the first report, and then they recite that we were entitled, over that whole period, to a deduction from the dollar fifty-five cent rate, because they say that "we found to have been unreasonable." Now it is perfectly idle, it seems to me, to argue that the Commission has never found that the rate during that whole period was unreasonable, and that is a finding of fact upon which this jury is to consider, as a prima facie case, the claim of the plaintiff here, and the findings as to the amount of shipments, of the difference between the rates prescribed or found reasonable, and the rates charged, give the jury also the prima facie case as to the amount to which the complainant is entitled. Now that seems to be the situation, if your Honor please.

Mr. PLATT: I do not wish to enter into a dispute with Mr. Glasgow as to what took place before the Commission, because it has no place before this Court at all. We simply have before the Court the record in this case, and I desire to take exception, and have it noted on the record, as to Mr. Glasgow making statements as to what occurred before the Commission.

Exception noted as requested by direction of the Court.

(Adjourned until Tuesday, November 12, 1912, at 10 A. M.)

140

### Statement.

#### Lehigh Valley Railroad Company.

	Tons.	Paid.	Amount paid.	65% basis.	Amount.
Nov., 1900.					
Prepared.	2,165.11	\$1.7223	\$3,729.73	1.4714	\$3,186.39
Pea .....	936.03	1.3204	1,236.09	1.2004	1,123.75
Buckw't..	1,027.03	1.2290	1,262.37	1.0844	1,113.84
Rice ....	111.09	1.10	122.60	1.13	125.93
Rice ....	352.03	1.00	352.15	1.13	397.93
Dec., 1900.					
Prepared.	2,691.08	1.7240	4,639.97	1.4723	3,962.55
Pea .....	968.05	1.3705	1,326.99	1.2459	1,206.34
Buckw't..	1,119.19	1.2474	1,397.03	1.1006	1,232.62
Rice ....	488.14	1.00	488.70	1.13	552.23
Jan'y, 1901.					
Prepared.	5,185.04	1.55	8,037.06	1.48	7,674.10
Pea .....	1,551.01	1.40	2,171.47	1.2982	2,013.57
Buckw't..	1,438.08	1.25	1,798.00	1.1346	1,632.01
Rice ....	1,412.18	1.25	1,766.13	1.10	1,554.19

	Tons.	Paid.	Amount paid.	65% basis.	Amount.
Feb'y, 1901.					
Prepared.	10,386.17	1.55	16,099.62	1.4684	15,252.03
Pea . . . . .	2,596.10	1.40	3,635.10	1.2890	3,346.89
Buckw't..	2,504.00	1.25	3,130.00	1.1287	2,826.20
Rice . . . .	1,132.16	1.25	1,416.00	1.10	1,246.00
March, 1901.					
Prepared.	14,165.04	1.55	21,956.06	1.4492	20,528.21
Pea . . . . .	2,712.11	1.40	3,797.57	1.3104	3,554.53
Buckw't..	1,433.12	1.25	1,792.00	1.1708	1,678.40
Rice . . . .	1,127.03	1.25	1,408.94	1.13	1,273.63
April, 1901.					
Prepared..	7,206.08	1.55	11,169.92	1.3552	9,766.11
Pea . . . . .	1,902.18	1.40	2,664.06	1.2813	2,438.19
Buckw't..	1,303.06	1.25	1,629.13	1.1265	1,468.17
Rice . . . .	103.06	1.25	129.13	1.0300	106.91
May, 1901.					
Prepared..	3,847.05	1.55	5,963.24	1.3803	5,310.36
Pea . . . . .	2,354.14	1.40	3,296.58	1.2537	2,952.09
Buckw't..	1,344.09	1.25	1,680.56	1.1281	1,516.67
Rice . . . .	0.00	1.25	0.00	....	0.00
June, 1901.					
Prepared..	5,094.17	1.55	7,897.02	1.4096	7,181.70
Pea . . . . .	1,477.02	1.40	2,067.94	1.2482	1,843.72
Buckw't..	670.19	1.25	838.69	1.1203	751.67
Rice . . . .	146.00	1.25	182.50	1.14	166.44
Brought					
Forw'd..	\$80,958.03		\$119,082.35		\$108,983.64
141 & 142					
Brought					
for'd...	\$80,958.03		\$119,082.35		\$108,983.64
July, 1901.					
Prepared..	4,518.01	1.55	7,002.98	1.4365	6,490.18
Pea . . . . .	2,193.12	1.40	3,071.04	1.2551	2,753.19
Buckw't..	610.17	1.25	763.56	1.1345	693.01
Rice . . . .	55.08	1.25	69.25	1.08	59.83
	<u>\$88,336.01</u>		<u>\$129,989.18</u>		<u>\$118,979.85</u>

Amount Paid..... \$129,989.18

65% Basis..... 118,979.85

\$11,009.33

Interest on \$11,009.33 from August 1, 1901, to Jan'y 1, 1912, 10 years, 153 days..... \$6,886.33

Interest on \$11,009.33 per day is \$1.84.

(Here follow pasters, marked pages 143-192.)





To Sept. 1, 1911.

	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time Interest		
									Yrs. Days		
Aug. 6, '01. 32	242.18			376.49		340.06					
" " "		88.10		123.90		115.05					
" " "			18.00	22.50	522.89	20.70	475.81	47.08	8/8	10	23
Aug. 13, '01. 33	1,625.01			2,518.83		2,275.07					
" " "		619.03		866.81		804.90					
" " "			170.12	213.26	3,598.90	196.19	3,276.16	322.74	8/15	10	16
Aug. 20, '01 34	1,470.01			2,278.58		2,058.07					
" " "		416.00		582.40		540.80					
" " "			158.18	198.63	3,059.61	182.73	2,781.60	278.01	8/22	10	9
Aug. 27, '01. 35	1,682.16			2,608.34		2,355.92					
" " "		149.04		208.88		193.96					
" " "			230.08	288.00	3,105.22	264.96	2,814.84	290.38	8/29	10	2
Sept. 3, '01. 36	1,972.04			3,056.91		2,761.08					
" " "		212.16		297.92		276.64					
" " "			225.14	282.13	3,636.96	259.55	3,297.27	339.69	9/5	9	360
Sept. 10, '01. 37	1,161.17			1,800.87		1,626.59					
" " "		316.04		442.68		411.06					
" " "			25.00	31.25	2,274.80	28.75	2,066.40	208.40	9/12	9	353
Sept. 17, '01. 38	2,416.12			3,745.73		3,383.24					
" " "		733.02		1,026.34		953.03					
" " "			464.07	580.44	5,352.51	534.00	4,870.27	482.24	9/20	9	345
Sept. 23, '01. 39	1,956.07			3,032.35		2,738.89					
" " "		796.19		1,115.73		1,036.03					
" " "			424.16	531.01	4,679.09	488.52	4,263.44	415.65	9/26	9	339
Oct. 1, '01. 40	2,917.16			4,522.59		4,084.92					
" " "		949.04		1,328.88		1,233.96					
" " "			636.13	795.82	6,647.29	732.15	6,051.03	596.26	10/3	9	332
Oct. 2, '01. 41	1,114.05			1,727.09		1,559.95					
" " "		271.09		380.03		352.88					
" " "			146.19	183.69	2,290.81	168.99	2,081.82	208.99	10/10	9	325
Oct. 2, '01. 42	606.02			939.46		848.54					
" " "		455.18		638.26		592.67					
" " "			141.12	177.00	1,754.72	162.84	1,604.05	150.67	10/10	9	325
Oct. 13, '01. 43	1,802.07			2,793.65		2,523.29					
" " "		392.11		549.57		510.31					
" " "			427.01	533.82	3,877.04	491.10	3,524.70	352.34	10/17	9	318
Oct. 22, '01. 44	1,659.03			2,571.68		2,322.81					
" " "		616.17		863.59		801.90					
" " "			380.02	475.13	3,910.40	437.12	3,561.83	348.57	10/24	9	311
Oct. 29, '01. 45	2,722.08			4,219.72		3,811.36					
" " "		777.16		1,088.72		1,011.14					
" " "			828.09	1,035.57	6,344.21	952.72	5,775.22	568.99	10/31	9	304
Nov. 2, '01. 46	1,509.01			2,339.03		2,112.67					
" " "		492.07		689.29		640.05					
" " "			514.09	643.06	3,671.38	591.62	3,344.34	327.04	11/7	9	297
Forward	24,858.18	7,288.00	4,793.00		54,725.83		49,788.78	4,937.05			2,941.88



# **Microcard Editions**

An Indian Head Company

A Division of Information Handling Services

# **CARD 2**

	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time	Interest
									Yrs. Days	
Forward	24,858.18	7,288.00	4,793.00		54,725.83		49,788.78	4,937.05		2,941.88
Nov. 12th, 1901	2,666.04			4,132.62		3,732.68				
B47		1,051.17		1,472.59		1,367.40				
			942.10	1,178.13	6,783.34	1,083.87	6,183.95	599.39	11/14 9 290	352.63
Nov. 19th, 1901	4,777.04			7,404.66		6,688.08				
48		1,203.03		1,684.41		1,564.10				
			1,501.00	1,876.26	10,965.33	1,726.15	9,978.33	987.00	11/21 9 283	579.53
Nov. 26th, 1901	4,844.19			7,509.68		6,782.93				
49		951.05		1,331.75		1,236.62				
			1,225.14	1,532.13	10,373.56	1,409.55	9,429.10	944.46	11/29 9 275	553.28
Dec. 3rd, 1901	2,792.07			4,328.15		3,909.29				
50		376.02		526.54		488.93				
			1,071.08	1,339.26	6,193.95	1,232.11	5,630.33	563.62	12/5 9 269	329.63
Dec. 3rd, 1901	179.13			278.46		251.51				
51		148.17		208.39		193.50				
			428.08	535.50	1,022.35	492.66	937.67	84.68	12/5 9 260	49.48
Dec. 10th, 1901	1,199.03			1,858.69		1,678.81				
52		258.12		362.04		336.18				
			555.07	694.19	2,914.92	638.65	2,653.64	261.28	12/12 9 262	152.48
Dec. 17th, 1901	2,320.17			3,597.33		3,249.19				
53		876.13		1,227.31		1,139.64				
			957.17	1,197.31	6,021.95	1,101.52	5,490.35	531.60	12/19 9 255	309.67
Dec. 24th, 1901	1,681.19			2,607.03		2,354.73				
54		432.15		605.85		562.57				
			645.07	806.69	4,019.57	742.15	3,659.45	360.12	12/27 9 247	209.28
Dec. 31st, 1901	793.07			1,229.70		1,110.69				
55		173.15		243.25		225.87				
			342.15	428.44	1,901.39	394.16	1,730.72	170.67	1/4 9 239	98.97
Dec. 31st, 1901			131.14	164.63	164.63	151.46	151.46	13.17	1/4 9 239	7.63
56										
Jan. 2nd, 1902	341.17			529.87		478.59				
57		455.07		637.49		591.95				
			468.05	585.31	1,752.67	538.49	1,609.03	143.64	1/9 9 234	83.15
Jan. 7th, 1902	67.08			104.48		94.36				
C1		50.12		70.84		65.78				
			43.03	53.94	229.26	49.62	209.76	19.50	1/16 9 227	11.29
Jan. 14th, 1902	1,094.01			1,695.79		1,531.67				
C1		445.10		623.70		579.15				
			506.05	632.82	2,952.31	582.19	2,693.01	259.30	1/16 9 227	149.82
Jan. 21st, 1902	928.01			1,438.48		1,299.27				
C3		747.13		1,046.71		971.94				
			1,007.09	1,259.32	3,744.51	1,158.57	3,429.78	314.73	1/23 9 220	181.50
Jan. 28th, 1902	1,263.00			1,957.65		1,768.20				
C4		618.19		866.53		804.63				
			427.13	534.57	3,358.75	491.80	3,064.63	294.12	1/30 9 213	169.26
Forward	49,808.18	15,079.00	15,047.15		117,124.32		106,639.99	10,484.33		6,179.48

	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	To Sept. 1911		
									Time	Interest	Yrs. Days.
Forward	49,808.18	15,079.00	15,047.15		117,124.32		106,639.99	10,484.33			6,179.48
Feb. 2nd, 1902	1,732.17			2,685.92		2,425.99					
C5		566.08		792.96		736.32					
			819.11	1,024.45	4,503.33	942.48	4,104.79	398.54	2/6	9 206	228.91
Feb. 11th, 1902	858.15			1,331.07		1,202.25					
6		404.01		565.67		525.27					
			381.17	477.32	2,374.06	439.12	2,160.64	207.42	2/13	9 199	188.87
Feb. 18th, 1902	1,788.16			2,757.15		2,490.32					
7		744.16		1,042.72		968.24					
			756.16	946.01	4,745.88	870.32	4,328.88	417.00	2/20	9 192	238.52
Feb. 25th, 1902	1,967.18			3,050.24		2,755.06					
8		328.02		459.34		426.53					
			1,024.06	1,280.38	4,789.96	1,177.95	4,359.54	430.42	2/27	9 185	245.68
Mar. 2nd, 1902	2,644.13			4,099.21		3,702.51					
9		114.05		159.95		148.53					
			17.04	21.50	4,280.66	19.78	3,870.82	409.84	3/6	9 178	233.47
Mar. 11th, 1902	905.07			1,403.29		1,267.49					
10		184.10		258.30	1,661.59	239.85	1,507.34	154.25	3/13	9 171	87.68
Mar. 18th, 1902	22.05			34.49		31.15					
11			157.15	197.19	231.68	181.41	212.56	19.12	3/20	9 164	10.84
Mar. 25th, 1902	877.06			1,359.81		1,228.22					
12		49.09		69.23		64.28					
			81.02	101.38	1,530.42	93.28	1,385.78	144.64	3/27	9 157	81.90
Apr. 1st, 1902	3,449.17			5,347.27		4,829.79					
13		830.10		1,162.70	6,509.97	1,079.65	5,909.44	600.53	4/3	9 150	339.30
Apr. 2nd, 1902	3,202.15			4,964.27		4,483.85					
13½		691.19		968.73	5,933.00	899.53	5,383.38	549.62	4/3	9 150	310.54
Apr. 8th, 1902	3,593.08			5,569.77		5,030.76					
14		618.07		865.69		803.85					
			181.02	226.38	6,661.84	208.27	6,042.88	618.96	4/10	9 143	348.99
Apr. 15th, 1902	4,663.12			7,228.58		6,529.04					
15		937.05		1,312.15		1,218.42					
			1,131.02	1,413.88	9,954.61	1,300.76	9,048.22	906.39	4/17	9 136	509.99
Apr. 22nd, 1902	5,404.01			8,376.28		7,565.67					
16		907.14		1,270.78		1,180.01					
			903.00	1,128.75	10,775.81	1,038.45	9,784.13	991.68	4/24	9 129	556.83
Apr. 29th, 1902	2,753.05			4,267.54		3,854.55					
17		1,415.16		1,982.12		1,840.54					
			768.19	961.20	7,210.86	884.30	6,579.39	631.47	5/1	9 122	353.82
May 2nd, 1902	527.11			817.70		738.57					
18		754.08		1,056.16		980.72					
			653.09	816.81	2,690.67	751.47	2,470.76	219.91	5/8	9 115	122.96
May 6th, 1902		161.01		225.47		209.37					
18A			105.06	131.56	357.03	121.04	330.41	26.62	5/8	9 115	14.89
Forward	84,191.04	23,787.11	22,029.03		191,335.69		174,124.95	17,210.74			9,982.67

9/1/11

	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time	Interest
									Yrs. Days.	
Forward	84,191.04	23,787.11	22,029.03		191,335.69		174,124.95	17,210.74		9,982.67
May 13th, 1902	1,868.02			2,895.55		2,615.34				
C20		753.00		1,054.20		978.90				
			952.00	1,190.00	5,139.75	1,094.80	4,689.04	450.71	5/15 9 108	251.50
May 20th, 1902	435.01			674.33		609.07				
C20A		169.17		237.79		220.80				
			197.15	247.19	1,159.31	227.41	1,057.28	102.03	5/22 9 101	56.80
June 24th, 1902	178.08				276.52		249.76	26.76	6/26 9 66	14.75
21										

Forward	86,672.15	24,710.08	23,178.18		197,911.37		180,121.03	17,790.24		10,305.72.
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9/1/11

	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time	Interest
									Yrs. Days.	
Forward	86,672.15	24,710.08	23,178.18		197,911.27		180,121.03	17,790.24		10,305.72
Aug. 12th, 1902	234.10				363.47		328.30	35.17	8/14 9 17	19.09
1001										
Sept. 30th, 1902										
1003	18.05			28.29		25.55				
			17.18	22.38	50.67	20.58	46.13	4.54	10/2 8 333	2.43
Oct. 28th, 1902	459.18			712.85		643.86				
1007		71.19		100.73		93.53				
			85.02	106.38	919.96	97.86	835.25	84.71	10/30 8 305	44.98
Nov. 2d, 1902	2,082.06			3,227.57		2,915.22				
1008			169.15	212.19		195.21				
		69.06		97.02	3,536.78	90.09	3,200.52	336.26	11/6 8 298	178.09
Nov. 11th, 1902	3,662.06			5,676.57		5,127.22				
1009		173.19		243.53		226.13				
			40.13	50.81	5,970.91	46.75	5,400.10	570.81	11/13 8 291	301.67
Nov. 18th, 1902	4,801.08			7,442.18		6,721.96				
1010		508.07		711.69	8,153.87	660.85	7,382.81	771.06	11/20 8 284	406.59
Nov. 25th, 1902	5,816.09			9,015.50		8,143.03				
1011		1,045.18		1,464.26		1,359.67				
			467.02	583.88	11,063.64	537.17	10,039.87	1,023.77	11/28 8 276	538.51
Dec. 2nd, 1902	5,127.01			7,946.94		7,177.88				
1012		523.00		732.20		679.90				
			548.16	686.00	9,365.14	631.12	8,488.90	876.24	12/4 8 270	459.99
Dec. 9th, 1902	3,797.04			5,885.67		5,316.08				
1013		457.14		640.78	6,526.45	595.01	5,911.09	615.36	12/11 8 263	322.33
Dec. 16th, 1902	5,781.13			8,961.56		8,094.31				
1014		715.10		1,001.70		930.15				
			982.18	1,228.63	11,191.89	1,130.33	10,154.79	1,037.10	12/18 8 255	541.87
Dec. 23d, 1902	4,455.05			6,905.65		6,237.35				
1015		899.06		1,259.02		1,169.09				
			757.11	946.94	9,111.61	871.18	8,277.62	833.99	12/26 8 248	434.78
Dec. 30th, 1902	5,008.12			7,763.33		7,012.04				
1016		627.03		878.01		815.30				
			967.17	1,209.81	9,851.15	1,113.03	8,940.37	910.78	1/2 8 241	473.76

Forward	127,917.12	29,802.10	27,216.10		274,016.81		249,126.78	24,890.03		14,029.81
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	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time	Interest
									Yrs. Days.	
Forward	127,917.12	29,802.10	27,316.10		274,016.81		249,126.78	24,890.03		14,029.81
Jan. 3rd, 1903	4,358.08			6,755.52		6,101.76				
1		27.13		38.71		35.95				
			817.19	1,022.45	7,816.68	940.64	7,078.35	738.33	1/8 8 235	383.30
Jan. 13th, 1903	6,045.09			9,370.46		8,463.62				
2		307.17		430.99		400.20				
			1,054.19	1,318.69	11,120.14	1,213.19	10,077.02	1,043.12	1/15 8 228	540.32
Jan. 20th, 1903	4,602.06			7,133.57		6,443.22				
3		411.03		575.61		534.49				
			301.14	377.13	8,086.31	346.96	7,324.67	761.64	1/22 8 221	393.65
Jan. 27th, 1903	2,817.06			4,366.82		3,944.22				
4		886.01		1,240.47		1,151.87				
			255.04	319.00	5,926.29	293.48	5,389.57	536.72	1/29 8 214	276.77
Feb. 3rd, 1903	2,538.10			3,934.68		3,553.90				
5		1,357.03		1,900.01		1,764.30				
			996.16	1,246.01	7,080.70	1,146.32	6,464.52	616.18	2/5 8 207	317.02
Feb. 3rd, 1903	2,298.07			3,562.44		3,217.69				
6		1,524.00		2,133.60		1,981.20				
			1,309.13	1,637.06	7,333.10	1,506.10	6,704.99	628.11	2/13 8 199	322.32
Feb. 17th, 1903	2,886.19			4,474.77		4,041.73				
7		882.19		1,236.13		1,147.84				
			836.15	1,045.94	6,756.84	962.26	6,151.83	605.01	2/19 8 193	309.86
Feb. 24th, 1903	233.08			361.77		326.76				
8		337.08		472.36		438.62				
			726.03	907.69	1,741.82	835.07	1,600.45	141.37	2/26 8 186	72.22
Mch. 3rd, 1903	1,487.13			2,305.86		2,082.71				
9		898.07		1,257.69		1,167.86				
			870.15	1,088.44	4,651.99	1,001.36	4,251.93	400.06	3/5 8 179	203.96
Mch. 10th, 1903	1,814.17			2,813.02		2,540.79				
10		229.03		320.81		297.90				
			1,335.13	1,669.57	4,803.40	1,536.00	4,374.69	428.71	3/12 8 172	218.08
Mch. 17th, 1903	1,140.08			1,767.62		1,596.56				
11		72.15		101.85		94.58				
			1,049.10	1,311.88	3,181.35	1,206.93	2,898.07	283.28	3/19 8 165	143.76
Mch. 24th, 1903	618.03			958.13		865.41				
12		217.03		304.01		282.30				
			832.10	1,040.63	2,302.77	957.38	2,105.09	197.68	3/26 8 158	100.10
Mch. 31st, 1903		145.15		204.05		189.48				
13			935.00	1,168.75	1,372.80	1,075.25	1,264.73	108.07	4/2 8 151	54.59
April 7th, 1903		475.15		666.05		618.48				
14			815.01	1,018.82	1,684.87	937.31	1,555.79	129.08	4/9 8 144	65.06
April 14th, 1903		662.00		926.80		860.60				
15			656.14	820.88	1,747.68	756.21	1,615.81	131.87	4/16 8 137	66.30
April 21st, 1903		480.09		672.63		624.59				
16			528.03	660.19	1,332.82	607.37	1,231.96	100.86	4/23 8 130	50.60
April 28th, 1903		396.17		555.59		515.91				
17			473.04	591.50	1,147.09	544.18	1,060.09	87.00	4/30 8 123	43.54
Forward	158,759.06	39,114.18	41,012.03		352,103.46		320,276.34	31,827.12		17,591.26

	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time	Interest
Forward	158,759.06	39,114.18	41,912.03		352,103.46		320,276.34	31,827.12	Yrs. Days. 17,591.26	
May 2nd, 1903		234.09		328.23		304.79				
18			1,112.12	1,390.75	1,718.98	1,279.49	1,584.28	134.70	5/7 8 116	67.27
May 12th, 1903		17.10		24.50		22.75				
19			870.07	1,087.94	1,112.44	1,000.90	1,023.65	88.79	5/14 8 109	44.24
May 19th, 1903		73.02		102.34		95.03				
20			798.16	998.50	1,100.84	918.62	1,013.65	87.19	5/21 8 102	43.33
May 26th, 1903			489.06		611.63	562.70	562.70	48.93	5/28 8 95	24.27
21										
June 2nd, 1903		25.02		35.14		32.63				
22			368.09	460.57	495.71	423.72	456.35	39.36	6/4 8 88	19.46
June 9th, 1903		241.13		338.31		314.14				
23			354.13	443.32	781.63	407.85	721.99	59.64	6/11 8 81	29.43
June 16th, 1903	694.14			1,076.79		972.58				
24		440.01		616.07		572.06				
June 23rd, 1903	1,002.05		791.00	988.75	2,681.61	909.65	2,454.29	227.32	6/18 8 74	111.91
25		233.08		1,553.49		1,403.15				
June 29th, 1903	87.14		913.15	1,142.19	3,022.44	1,050.81	2,757.38	265.06	6/25 8 67	130.18
26		42.18		135.94		122.78				
July 7th, 1903			924.00	1,155.00	1,351.00	1,062.60	1,241.15	109.85	7/2 8 60	53.82
28-27		434.18		608.86		565.37				
July 14th, 1903			451.09	564.32	1,173.18	519.17	1,084.54	88.64	7/9 8 53	43.34
29		687.01		961.87		893.17				
July 21st, 1903			1,081.07	1,351.69	2,313.56	1,243.55	2,136.72	176.84	7/16 8 46	86.24
30		880.10		1,232.70		1,144.65				
July 28th, 1903			1,242.11	1,553.19	2,785.89	1,428.93	2,573.58	212.31	7/23 8 39	103.28
31		425.08		595.56		553.02				
Aug. 2nd, 1903			770.09	963.06	1,558.62	886.02	1,439.04	119.58	7/30 8 32	58.04
32		970.00		1,358.00		1,261.00				
Aug. 11th, 1903			1,067.01	1,333.82	2,691.82	1,227.11	2,488.11	203.71	8/6 8 25	98.63
33		249.08		480.16		454.22				
Aug. 18th, 1903			230.18	288.63	777.79	265.54	719.76	58.03	8/13 8 18	28.01
34		866.10		1,213.10		1,126.45				
Aug. 25th, 1903			107.16	134.75	1,347.85	123.97	1,250.42	97.43	8/20 8 11	46.94
35		188.00		263.20		244.40				
Sept. 1st, 1903			306.10	383.13	646.33	352.48	596.88	49.45	8/27 8 4	23.77
36		359.15		503.65		467.68				
Sept. 2nd, 1903			211.03	263.94	767.59	242.82	710.50	57.09	9/3 7 362	27.42
37		475.17		666.19		618.61				
Sept. 15th, 1903			87.19	109.94	776.13	101.14	719.75	56.38	9/10 7 355	26.99
38	158.17			246.22		222.39				
		332.08		465.36		432.12				
			385.13	482.07	1,193.65	443.50	1,098.01	95.64	9/17 7 348	45.74
Forward	160,702.16	46,392.16	53,577.17		381,012.15		346,909.09	34,103.06	18,703.57	

	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time	Interest
									Yrs. Days.	
Forward	160,702.16	46,392.16	53,577.17		381,012.15		346,909.09	34,103.06		18,705.57
Sept. 22nd, 1903	1,214.14			1,882.79		1,700.58				
39		589.06		825.02		766.09				
			928.08	1,160.50	3,868.31	1,067.66	3,534.33	333.98	9/24 7 341	159.25
Sept. 29th, 1903	1,112.04			1,723.91		1,557.08				
40		210.03		294.21		273.19				
			700.12	875.75	2,893.87	805.69	2,635.96	257.91	10/1 7 334	122.68
Oct. 6th, 1903	327.18			508.24		459.06				
41		93.17		131.39		122.00				
			462.00	577.51	1,217.14	531.30	1,112.36	104.78	10/8 7 327	49.72
Oct. 13th, 1903	327.08			507.47		458.36				
42		94.09		132.23		122.79				
			734.08	918.00	1,557.70	844.56	1,425.71	131.99	10/15 7 320	62.48
Oct. 20th, 1903	1,001.11			1,552.40		1,402.17				
43		228.08		319.76		296.92				
			912.13	1,140.82	3,012.98	1,049.55	2,748.64	264.34	10/22 7 313	124.79
Oct. 27th, 1903	1,160.13			1,799.01		1,624.91				
44		358.07		501.69		465.85				
			648.05	810.32	3,111.02	745.49	2,836.25	274.77	10/29 7 306	129.43
Nov. 3rd, 1903	127.19			198.32		179.13				
45		33.00		46.20		42.90				
			21.18	27.38	271.90	25.19	247.22	24.68	11/5 7 299	11.60
Nov. 10th, 1903										
46			185.11	231.94	231.94	213.38	213.38	18.56	11/12 7 292	8.68
Nov. 17th, 1903	546.16			847.54		765.52				
47		249.07		349.09		324.16				
			675.00	843.75	2,040.38	776.25	1,865.93	174.45	11/19 7 285	81.54
Nov. 24th, 1903	619.04			959.76		866.88				
48		147.11		206.57		191.82				
			439.00	548.76	1,715.09	504.85	1,563.55	151.54	11/27 7 277	70.67
Dec. 2nd, 1903	1,061.16			1,645.79		1,486.52				
49		41.15		58.45		54.28				
			1,002.07	1,252.94	2,957.18	1,152.70	2,693.50	263.68	12/7 7 267	122.50
Dec. 8th, 1903	437.14			678.44		612.78				
50			520.07	650.44	1,328.88	598.40	1,211.18	117.70	12/12 7 262	54.59
Dec. 16th, 1903	117.11			182.20		164.57				
51		76.01		106.47		98.87				
			790.11	998.19	1,276.86	909.13	1,172.57	104.29	12/21 7 253	48.19
Dec. 23rd, 1903	778.12			1,206.84		1,090.04				
52		320.00		448.00		416.00				
			733.09	916.82	2,571.66	843.47	2,349.51	222.15	12/28 7 246	102.40
Forward	169,536.16	48,835.00	62,332.06		409,067.06		372,519.18	36,547.88		19,852.09

	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time	Interest
									Yrs. Days.	
Forward	169,536.16	48,835.00	62,332.06		409,067.06		372,519.18	36,547.88		19,852.09
Jany. 1st, 1904	754.19			1,170.18		1,056.93				
53		98.15		138.25		128.38				
Jany. 9th, 1904	401.05		1,005.07	1,256.69	2,565.12	1,156.15	2,341.46	223.66	1/6 7 237	102.78
54-1		84.12		621.94		561.75				
Jany. 16th, 1904	192.01		284.10	355.62	1,096.00	327.17	998.90	97.10	1/13 7 230	44.50
2				297.68		268.87				
Jany. 23rd, 1904	514.11		547.10	684.38	982.06	629.63	898.50	83.56	1/20 7 223	38.18
3		61.10		797.55		720.37				
Feby. 2nd, 1904	822.04		605.01	756.32	1,639.97	695.81	1,496.13	143.84	1/27 7 216	65.59
4		192.13		1,274.41		1,151.08				
Feby. 9th, 1904	187.06		1,064.10	1,330.63	2,874.75	1,224.17	2,625.69	249.06	2/8 7 204	113.07
5		25.15		290.32		262.22				
Feby. 16th, 1904	1,310.13		414.18	518.62	844.99	477.13	772.83	72.16	2/11 7 201	32.72
6		53.00		2,031.51		1,834.91				
Feby. 23rd, 1904	688.12		742.06	927.88	3,033.59	853.65	2,757.46	276.13	2/19 7 193	124.85
7		474.19		1,067.34		964.04				
Mch. 2d, 1904	101.00		699.19	874.94	2,607.21	804.94	2,386.41	220.80	2/25 7 187	99.62
8		283.04		156.56		141.40				
Mch. 9th, 1904	940.06		86.17	108.56	661.60	99.88	609.44	52.16	3/6 7 178	23.43
9		602.15		1,457.46		1,316.42				
Mch. 16th, 1904	1,302.01		309.02	386.38	2,687.69	355.47	2,455.46	232.23	3/13 7 171	104.14
10				2,018.18		1,822.87				
Mch. 23rd, 1904	2,372.13		331.03	413.94	2,432.12	380.82	2,203.69	228.43	3/20 7 164	102.17
11				3,677.61		3,321.71				
April 2nd, 1904	4,810.17		266.03	332.69	4,010.30	306.07	3,627.78	382.52	3/27 7 157	170.65
		947.13		7,456.82		6,735.19				
April 9th, 1904	281.03		1,234.15	1,326.71	10,326.97	1,419.96	9,387.09	939.88	4/7 7 146	417.62
13		208.12		435.78		393.61				
April 16th, 1904	244.14		468.08	585.50	1,313.32	538.66	1,203.45	109.87	4/12 7 141	48.73
14		396.14		379.29		342.58				
April 23rd, 1904	1,350.01		1,158.08	1,448.00	2,382.67	1,332.16	2,190.45	192.22	4/20 7 133	84.98
15		600.02		2,092.58		1,890.07				
			1,171.19	840.14	4,397.66	780.13	4,017.94	379.72	4/26 7 127	167.52
				1,464.94		1,347.74				
Forward	185,811.02	52,865.04	72,723.02		452,923.08		412,491.86	40,431.22		21,592.64

	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time	Interest
									Yrs. Days.	
Forward	185,811.02	52,865.04	72,723.02		452,923.08		412,491.86	40,431.22		21,592.64
May 3d, 1904	266.03			412.54		372.61				
16		1,087.04		1,522.08		1,413.36				
May 10th, 1904	174.05		1,636.14	2,045.87	3,980.49	1,882.20	3,668.17	312.32	5/5 7 118	137.31
17		636.01		270.09		243.95				
May 17th, 1904	64.06		912.18	890.47	2,301.69	826.86				
18		716.02		1,141.13		1,049.83	2,120.64	181.05	5/14 7 109	79.33
May 24th, 1904				99.67		90.02				
19		859.00	1,103.17	1,379.82	2,482.03	930.93	2,290.38	191.65	5/19 7 104	83.81
June 2nd, 1904	80.19		1,236.16	1,202.60	2,748.60	1,116.70	2,539.02	209.58	5/27 7 96	91.38
20		1,079.09		1,546.00		1,422.32				
June 9th, 1904	539.17		1,397.00	125.48	3,382.96	113.33	3,123.16	259.80	6/8 7 84	112.75
21		269.05		1,511.23		1,403.28				
June 16th, 1904	1,376.01		734.04	1,746.25	2,131.48	1,606.55	1,950.14	181.34	6/11 7 81	78.60
22		487.18		836.77		755.79				
June 23d, 1904	372.00		1,281.15	376.95	4,418.13	350.02	4,034.75	383.38	6/18 7 74	165.74
23		655.15		917.76		844.33				
				2,132.88		1,926.47				
				683.06		634.27				
				1,602.19		1,474.01				
				576.60		520.80				
				918.05		852.48				
			1,298.04	1,622.75	3,117.40	1,492.93	2,866.21	251.19	6/25 7 67	108.30

Forward	188,684.13	58,655.18	82,324.10		477,485.86		435,064.33	42,401.53		22,449.86
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	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time	Interest
									Yrs. Days.	
Forward	188,684.13	58,655.18	82,324.10		477,485.86		435,084.33	42,401.53		22,449.86
July 2nd, 1904										
	322.18			500.50		452.06				
24		807.08		1,130.36		1,049.62				
			788.16	986.00	2,616.86	907.12	2,408.80	208.06	7/9 7 53	89.23
July 9th, 1904	106.14			165.39		149.38				
25		75.03		105.21		97.69				
			172.13	215.81	486.41	198.55	445.62	40.79	7/12 7 50	17.47

Forward	189,114.05	59,538.09	83,285.19	480,589.13	437,938.75	42,650.38	22,556.56
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	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time	Interest
									Yrs. Days.	
Forward	189,114.05	59,538.09	83,285.19		480,589.13		437,938.75	42,650.38		22,556.56
July 16th, 1904										
26			52.12	65.76	65.76	60.49	60.49	5.27	7/20 7	42 2.25
July 23rd, 1904										
27			385.12	482.00	482.00	443.44	443.44	38.56	7/26 7	36 16.42

Forward	189,114.05	59,538.09	83,724.03		481,136.89		438,442.68	42,694.21		22,575.23
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	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time	Interest
									Yrs. Days.	
Forward	189,114.05	59,538.09	83,724.03		481,136.89		438,442.68	42,694.21		22,575.23
Aug. 2nd, 1904			443.19	554.94	554.94	510.54	510.54	44.40	8/6 7 25	18.82
28										

Forward	189,114.05	59,538.09	84,168.02		481,691.83		438,953.22	42,738.61		22,594.06
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	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time	Interest
									Yrs. Days.	
Forward	189,114.05	59,538.09	84,168.02		481,691.83		438,953.22	42,738.61		22,594.05
Sept. 9th, 1904	439.12			681.38		615.44				
29		44.08		62.16		57.72				
			75.11	94.44	837.98	86.88	760.04	77.94	9/13 6 352	32.63
Sept. 16th, 1904	445.17			691.07		624.19				
30		57.14		80.78		75.01				
			103.10	129.38	901.23	119.02	818.22	83.01	9/20 6 345	34.65
Sept. 23rd, 1904	447.04			693.16		626.08				
31		149.15		209.65		194.68				
			102.10	128.13	1,030.94	117.88	938.64	92.30	9/27 6 338	38.40
Oct. 2nd, 1904	272.02			421.76		380.94				
32		93.19		131.53		122.13				
			89.17	112.31	665.60	103.33	606.40	59.20	10/6 6 329	24.55
Oct. 9th, 1904	38.11			59.75		53.97				
33		17.11		24.57		22.81				
			154.15	193.44	277.76	177.96	254.74	23.02	10/13 6 322	9.52
Oct. 15th, 1904	241.00			373.55		337.40				
34		37.19		53.13		49.33				
			170.08	213.00	639.68	195.96	582.69	56.99	10/20 6 315	23.47
Oct. 23rd, 1904	416.05			645.19		582.75				
25			160.13	200.81	846.00	184.75	767.50	78.50	10/27 6 308	32.32
Nov. 1st, 1904	709.16			1,100.19		993.72				
36		480.11		672.77		624.71				
			333.16	417.25	2,190.21	383.87	2,002.30	187.91	11/5 6 299	77.02
Nov. 8th, 1904	114.15			177.86		160.65				
37		311.10		436.10		404.95				
			147.11	184.44	798.40	169.68	735.28	63.12	11/13 6 291	25.77
Nov. 16th, 1904	425.17			660.07		596.19				
38		237.08		332.36		308.62				
			219.12	274.50	1,266.93	252.54	1,157.35	109.58	11/19 6 285	44.68
Nov. 23rd, 1904	331.19			514.52		464.73				
39		178.02		249.34		231.53				
			120.12	150.75	914.61	138.69	834.95	79.66	11/26 6 278	32.39

Forward	192,997.03	61,147.06	85,846.17		492,061.17		448,411.33	43,649.84		22,969.45
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	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time	Interest
Forward	192,997.03	61,147.06	85,846.17		492,061.17		448,411.33	43,649.84	Yrs. Days. 22,969.45	
Dec. 3rd, 1904	694.17			1,077.02		972.79				
40		185.09		259.63		241.08				
Dec. 9th, 1904	118.01		394.14	493.38	1,830.03	453.90	1,667.77	162.26	12/8	6 266 65.59
41		174.16		182.98		165.27				
				244.72		227.24				
Dec. 16th, 1904	291.06		110.09	138.06	565.76	127.01	519.52	46.24	12/13	6 261 18.65
42		298.03		451.52		407.82				
				417.41		387.60				
Dec. 23rd, 1904	37.16		316.14	395.88	1,264.81	364.20	1,159.62	105.19	12/20	6 254 42.31
43		143.19		58.59		52.92				
				201.53		187.13				
Jan. 2nd, 1905	68.01		217.11	271.94	532.06	250.18	490.23	41.83	12/28	6 246 16.74
44		456.18		105.48		95.27				
				639.66		593.97				
Jan. 10th, 1905			493.11	616.94	1,362.08	567.58	1,256.82	105.26	1/7	6 236 42.04
45		332.18		466.06		432.77				
Jan. 17th, 1905			176.01	220.06	686.12	202.46	635.23	50.89	1/12	6 231 20.28
46-2		571.19		800.73		743.53				
			176.02	220.13	1,020.86	202.51	946.04	74.82	1/19	( 6 (224 33.95
			\$1.20							(
			213.06	255.96	255.96	245.29	245.29	10.67	1/19	
Jan. 24th, 1905		460.05		644.35		598.33				
3			344.11	413.46	1,057.81	396.23	994.56	63.25	1/26	6 217 25.05
Feb. 2nd, 1905	222.15			345.26		311.85				
4		460.17		645.19		599.10				
			330.19	397.14	1,387.59	380.59	1,291.54	96.05	2/9	6 203 37.83
Feb. 9th, 1905	356.17			553.12		499.59				
5		407.00		569.80		529.10				
			230.18	277.08	1,400.00	265.53	1,204.22	105.78	2/11	6 201 41.63
Feb. 16th, 1905		313.09		438.83		407.48				
6			133.05	159.90	598.73	153.24	560.72	38.01	2/18	6 194 14.91
Feb. 23rd, 1905	491.07			761.59		687.89				
7		648.08		907.76		842.92				
			149.04	179.04	1,848.39	171.58	1,702.39	146.00	2/28	6 184 57.04

Forward	195,278.03	65,691.07	87,731.19 @ 1.25	505,871.37		461,175.28	44,696.09		23,385.47
			1,402.03 @ 1.20						

	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time	Interest
									Yrs. Days.	
Forward	195,278.03	65,601.07	1,402.03		505,871.37		461,175.28	44,696.09		23,385.47
March 2nd, 1905	268.03			415.63		375.41				
8		514.00		719.60		668.20				
			584.13	701.58	1,836.81	672.35	1,715.96	120.85	3/7 6 177	47.08
March 9th, 1905	57.17			89.67		80.99				
9		322.00		450.80		418.60				
			349.18	419.88	960.35	402.38	901.97	58.38	3/11 6 173	22.69
March 16th, 1905	623.05			966.04		872.55				
10		580.09		812.63		754.58				
			513.18	616.68	2,395.35	590.98	2,218.11	177.24	3/18 6 166	68.70
March 23rd, 1905	474.19			736.17		664.93				
11		521.16		730.52		678.34				
			590.07	708.42	2,175.11	678.90	2,022.17	152.94	3/25 6 159	59.11
April 2nd, 1905	440.14			683.09		616.98				
12		840.11		1,176.77		1,092.71				
			701.18	842.28	2,702.14	807.18	2,516.87	185.27	4/8 6 145	71.16
April 9th, 1905	29.09			45.65		41.23				
13		160.12		224.84		208.78				
			194.09	233.34	503.83	223.62	473.63	30.20	4/13 6 140	11.57
April 16th, 1905	561.18			870.95		786.66				
14		479.08		671.16		623.22				
			430.14	516.84	2,058.95	495.30	1,905.18	153.77	4/20 6 133	58.74
April 23rd, 1905	370.01			573.58		518.07				
15		382.11		535.57		497.31				
			265.12	318.72	1,427.87	305.44	1,320.82	107.05	4/27 6 126	40.79
May 2nd, 1905	688.02			1,066.56		963.34				
16		829.07		1,161.09		1,078.15				
			574.10	689.40	2,917.05	660.67	2,702.16	214.89	5/6 6 117	81.55
May 8th, 1905	101.08			157.17		141.96				
17		525.04		735.28		682.76				
			243.17	292.62	1,185.07	280.42	1,105.14	79.93	5/11 6 112	30.26
May 16th, 1905		643.04		900.48		836.16				
			412.12	495.12	1,395.60	474.49	1,310.65	84.95	5/18 6 105	32.07
May 23rd, 1905		576.11		807.17		749.51				
19			493.19	592.74	1,399.91	568.04	1,317.55	82.36	5/25 6 98	30.99
June 2nd, 1905	283.07			439.19		396.69				
20		858.03		1,201.41		1,115.59				
			670.00	804.00	2,444.60	770.50	2,282.78	161.82	6/8 6 84	60.52
June 16th, 1905	66.07			102.84		92.89				
22		592.02		828.94		769.73				
			304.02	364.92	1,296.70	349.71	1,212.33	84.37	6/20 6 72	31.38
June 9th, 1905	77.15			120.51		108.85				
21		396.10		555.10		515.45				
			345.03	414.18	1,089.79	396.92	1,021.22	68.57	6/13 6 79	25.60
Forward	199,321.08	73,823.15	8,077.15		531,660.50		485,201.82	46,458.68		24,057.68

	Prepared	Pea	Buck.	Amt. Chgd.	Tot
Forward	199,321.08	73,823.15	8,077.15		531,660
June 23rd, 1905	381.07	"		591.09	
23		473.19		663.53	
			348.09	418.14	1,672
July 2nd, 1905	460.09			713.70	
24		815.02		1,141.14	
			516.05	619.50	2,474
July 9th, 1905		54.09		76.23	
25			87.03	104.58	180

Forward	200,163.04	75,167.05	9,029.12		535,980
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	Adj. Basis	Total	Excess	Time	Interest
				Yrs. Days.	
0		485,201.82	46,458.68		24,057.68
	533.89				
	616.13				
6	400.72	1,550.74	122.02	6/27 6 65	45.24
	644.63				
	1,059.63				
4	593.69	2,297.95	176.39	7/8 6 54	65.08
	70.78				
1	100.22	171.00	9.81	7/13 6 49	3.61

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	489,221.51	46,766.90		24,171.61
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	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time	Interest
									Yrs. Days.	
Forward	200,163.04	75,167.05	9,029.12		535,988.41		489,221.51	46,766.90		24,171.61
July 16th, 1905	660.12			1,023.93		924.84				
26		470.10		658.70		611.65				
			289.06	347.16	2,029.79	332.69	1,869.18	160.61	7/20 6 42	58.95
July 23rd, 1905	287.06			445.32		402.22				
27		462.06		647.22		600.99				
			415.09	498.54	1,591.08	477.76	1,480.97	110.11	7/27 6 35	40.28
Aug. 2nd, 1905	575.08			891.87		805.56				
28		852.13		1,193.71		1,108.44				
			545.08	654.48	2,740.06	627.21	2,541.21	198.85	8/8 6 23	72.35
Aug. 9th, 1905	191.11			296.90		268.17				
29		238.02		333.34		309.53				
			181.07	217.62	847.86	208.55	786.25	61.61	8/12 6 19	22.37
Aug. 16th, 1905	466.03			722.53		652.61				
30		128.00		179.20		166.40				
			91.15	110.10	1,011.83	105.51	924.52	87.31	8/21 6 10	31.58
Aug. 23rd, 1905	1,099.06			1,703.92		1,539.02				
31		477.18		669.06		621.27				
			392.18	471.48	2,844.46	451.83	2,612.12	232.34	8/26 6 5	83.84
Sept. 2nd, 1905	2,043.17			3,167.97		2,861.39				
32		1,052.05		1,473.15		1,367.93				
			960.16	1,152.96	5,794.08	1,104.92	5,334.24	459.84	9/9 5 356	165.24
Sept. 9th, 1905	290.04			449.81		406.28				
33		197.19		277.13		257.33				
			133.01	159.66	886.60	153.00	816.61	69.99	9/12 5 353	25.12
Sept. 16th, 1905	573.00			888.15		802.20				
34		607.15		850.85		790.07				
			373.03	447.78	2,186.78	429.12	2,021.39	165.39	9/19 5 346	59.12
Sept. 23rd, 1905	613.11			951.00		858.97				
35		457.01		639.87		594.17				
			279.01	334.86	1,925.73	320.90	1,774.04	151.69	9/26 5 339	54.10
Oct. 3rd, 1905	1,323.16			2,051.89		1,853.32				
36		669.06		937.02		870.09				
			541.03	649.38	3,638.29	622.32	3,345.73	292.56	10/7 5 328	103.78

Forward	208,287.18	80,781.00	13,232.19		561,484.97		512,727.77	48,757.20		24,888.34
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	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time	Interest
									Yrs. Days.	
Forward	208,287.18	80,781.00	13,232.19		561,484.97		512,727.77	48,757.20		24,888.34
Oct. 10th, 1905	523.11			811.50		732.97				
37		255.15		358.05		332.47				
			250.11	300.66	1,470.21	288.13	1,353.57	116.64	10/12 5 323	41.29
Oct. 17th, 1905	562.01			871.18		786.87				
38		355.04		497.28		461.76				
			254.12	305.52	1,673.98	292.79	1,541.42	132.56	10/19 5 316	46.72
Oct. 24th, 1905	371.14			576.14		520.38				
39		556.05		778.75		723.12				
			318.02	381.72	1,736.61	365.82	1,609.32	127.29	10/26 5 309	44.73
Nov. 2nd, 1905	493.09			764.85		690.83				
40		427.19		599.13		556.33				
			160.10	192.60	1,556.58	184.57	1,431.73	124.85	11/7 5 297	43.64
Nov. 9th, 1905	334.13			518.71		468.51				
41		252.09		353.43	872.14	328.18	796.69	75.45	11/13 5 291	26.28
Nov. 16th, 1905	1,232.10			1,910.38		1,725.50				
42		237.05		332.15	2,242.53	308.42	2,083.92	208.61	11/18 5 286	72.54
Nov. 23rd, 1905	312.17			484.92		437.99				
43		191.13		268.31		249.14				
			329.00	394.80	1,148.03	378.35	1,065.48	82.55	11/25 5 279	28.63
Dec. 2nd, 1905	798.19			1,238.37		1,118.53				
44		450.11		630.77		585.71				
			543.10	652.20	2,521.34	625.03	2,329.27	192.07	12/7 5 267	66.17
Dec. 9th, 1905	290.02			449.66		406.14				
45		76.07		106.89		99.25				
			363.05	435.90	992.45	417.73	923.12	69.33	12/12 5 262	23.80
Dec. 16th, 1905	93.17			145.47		131.39				
46		521.10		730.10		677.95				
			296.13	365.98	1,231.55	341.15	1,150.49	81.06	12/19 5 255	27.76
Dec. 23rd, 1905	72.15			112.76		101.85				
47		99.08		139.16		129.22				
			112.10	135.00	386.92	129.37	360.44	26.48	12/28 5 246	9.01
Jan. 2nd, 1906	470.17			729.82		659.19				
48		633.18		887.46		824.07				
			612.04	734.64	2,351.92	704.03	2,187.29	164.63	1/9 5 234	55.83
Jan. 9th, 1906	234.02			362.86		327.74				
1		300.14		420.98		390.91				
			168.10	202.20	986.04	193.77	912.42	73.62	1/11 5 232	24.95
Jan. 16th, 1906	558.17			866.22		782.39				
2		402.00		562.80		522.60				
			396.12	475.92	1,904.94	456.09	1,761.08	143.86	1/18 5 225	48.56
Jan. 23rd, 1906	1,445.18			2,241.15		2,024.26				
3		687.16		962.92		894.14				
			342.15	411.30	3,615.37	394.16	3,312.56	302.81	1/25 5 218	101.85
Forward	216,084.00	86,229.14	17,381.13		586,175.58		535,496.57	50,679.01		25,550.10

	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time	Interest
									Yrs. Days.	
Forward	216,084.00	86,229.14	17,381.13		586,175.58		535,496.57	50,679.01		25,550.10
Feb. 2nd, 1906	2,908.19			4,508.87		4,072.53				
4		887.09		1,242.43		1,153.68				
Feb. 9th, 1906	157.04		691.18	830.28	6,581.58	795.68	6,021.89	559.69	2/8 5 204	186.94
5		220.18		243.66		220.08				
Feb. 16th, 1906	613.00		153.01	309.26		287.17				
6		378.06		183.66	736.58	176.00	683.25	53.33	2/14 5 198	17.75
Feb. 23rd, 1906	1,612.19			950.15		858.20				
7			206.19	529.62		491.79				
March 2d, 1906	1,002.01			248.34	1,728.11	237.99	1,587.98	140.13	2/20 5 192	46.51
8		457.18		2,500.07		2,258.13				
March 9th, 1906	926.07		338.13	641.06		596.27				
9				406.38	3,547.51	389.45	3,242.85	304.66	2/27 5 185	100.80
Mar. 16th, 1906	1,226.18			1,553.18		1,402.87				
10		628.18		880.46		817.57				
Mar. 23rd, 1906	928.03		371.10	445.80	2,879.44	427.22	2,647.66	231.78	3/8 5 176	76.34
11		421.07		1,435.84		1,296.89				
April 2nd, 1906	1,856.05		430.09	589.89		547.75				
12		496.09		516.54	2,542.27	495.01	2,339.65	202.62	3/13 5 171	66.58
April 9th, 1906	192.15			1,901.70		1,717.66				
13		39.06		695.03		645.38				
May 23rd, 1906	728.04		327.18	393.48	2,990.21	377.08	2,740.12	250.09	3/20 5 164	81.86
14		154.12		1,438.63		1,299.41				
June 2nd, 1906	409.17			284.83		264.48				
15		673.11		325.14	2,048.60	311.59	1,875.48	173.12	3/27 5 157	56.47
June 9th, 1906	72.13		270.19	2,877.19		2,598.75				
16		179.17		427.07		396.56				
June 16th, 1906	345.16		770.10	924.60	4,228.86	886.07	3,881.38	347.48	4/7 5 146	112.68
17		477.08		298.76		269.85				
Forward	229,065.01	91,754.03	21,870.04	55.02		51.09				
				60.42	414.20	57.90	378.84	35.26	4/13 5 140	11.43
				1,128.71		1,019.48				
				216.44		200.98				
			124.04	149.04	1,494.19	142.83	1,363.29	130.90	5/26 5 97	41.39
				635.27		573.79				
				942.97		875.61				
			357.02	428.52	2,006.76	410.66	1,860.06	146.70	6/9 5 83	46.04
				112.61		101.71				
			179.01	251.79		233.80				
				214.86	579.26	205.91	541.42	37.84	6/12 5 80	11.86
				535.99		484.12				
				668.36		620.62				
			216.00	259.20	1,463.55	248.40	1,353.14	110.41	6/19 5 73	34.47
Forward	229,065.01	91,754.03	21,870.04		619,416.70		566,013.58	53,403.12		26,441.22

	Prepared	Pea	Buck.	Amt. Chgd
Forward	229,065.01	91,754.03	21,870.04	0
June 23rd, 1906	634.09			983.40
18		395.06		553.42
			339.03	406.98

Forward	229,699.10	92,149.09	22,209.07	0
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hgd.	Total	Adj. Basis	Total	Excess	Time	Interest
					Yrs. Days.	
	619,416.70		566,013.58	53,403.12		26,441.22
0		888.23				
2		513.89				
8	1,943.80	390.02	1,792.14	151.66	6/26 5 66	47.17

621,360.50

567,805.72 53,554.78

26,488.39

	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time	Interest
									Yrs. Days	
Forward	229,699.10	92,149.09	22,209.07		621,360.50		567,805.72	53,554.78		26,488.39
July 2nd, 1906	1,356.11			2,102.65		1,899.17				
19		864.11		1,210.37		1,123.91				
			604.08	725.28	4,038.30	695.06	3,718.14	320.16	7/10 5 52	98.82
July 9th, 1906	113.18			176.55		159.46				
20		143.15		201.25		186.87				
			161.09	193.74	571.54	185.67	532.00	39.54	7/12 5 50	12.19
July 17th, 1906		249.02		348.74		323.83				
21			299.14	359.64	708.38	344.65	668.48	39.90	7/19 5 43	12.25
July 24th, 1906		331.13		464.31		431.14				
22			349.12	419.52	883.83	402.04	833.18	50.65	7/25 5 37	15.50
Aug. 2nd, 1906	242.06			375.57		339.22				
23		446.15		625.45		580.77				
			507.00	608.40	1,609.42	583.05	1,503.04	106.38	8/9 5 22	32.31
Aug. 9th, 1906	221.11			343.40		310.17				
24		101.19		142.73		132.53				
			223.14	268.44	754.57	257.25	699.95	54.62	8/11 5 20	16.57
Aug. 16th, 1906	395.07			612.79		553.49				
25		562.05		787.15		730.92				
			66.10	79.80	1,479.74	76.47	1,360.88	118.86	8/18 5 13	35.92
Aug. 23rd, 1906	326.09			506.00		457.03				
26		345.13		483.91		449.34				
			294.08	353.28	1,343.19	338.56	1,244.93	98.26	8/25 5 6	29.58

Forward	232,355.12	95,195.02	24,716.02		632,749.47		578,366.32	54,383.15		26,741.53
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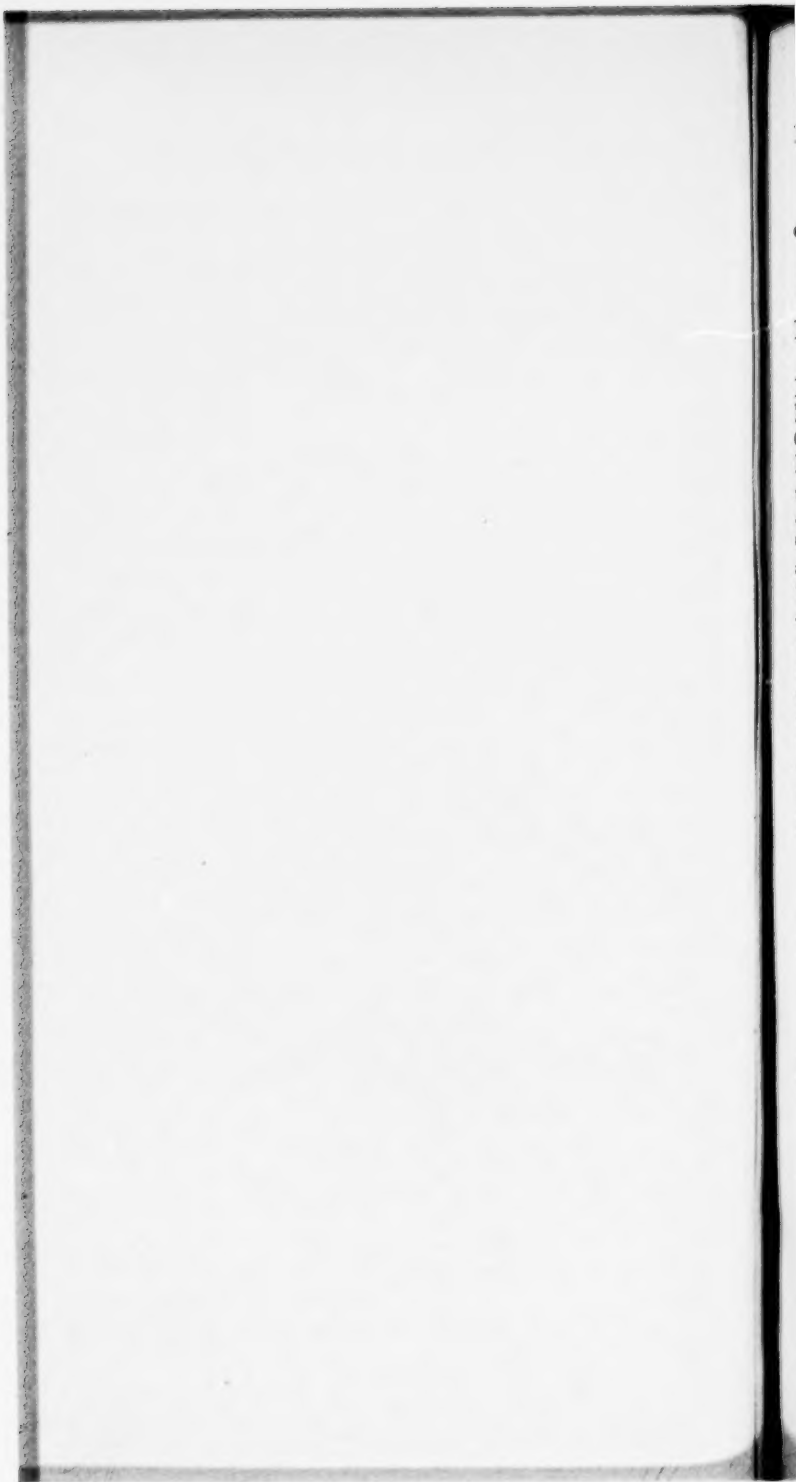
	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time	Interest
									Yrs. Days	
Forward	232,355.12	95,195.02	24,716.02		632,749.47		578,366.32	54,383.15		26,741.53
Sept. 2nd, 1906	39.06			60.92		55.02				
27		870.07		1,218.49		1,131.45				
			744.14	893.64	2,173.05	856.40	2,042.87	130.18	9/8 4	357 38.98
Sept. 9th, 1906		153.00		214.20		198.90				
28			70.05	84.30	298.50	80.79	279.69	18.81	9/13 4	352 5.62
Sept. 16th, 1906		335.08		469.56		436.02				
29			267.11	321.06	790.62	307.68	743.70	46.92	9/20 4	345 13.96
Sept. 23rd, 1906		352.07		493.29		458.05				
30			205.07	246.42	739.71	236.15	694.20	45.51	9/27 4	338 13.53
Oct. 2nd, 1906	96.16			150.04		135.52				
31		531.11		744.17		691.01				
			543.10	652.20	1,546.41	625.02	1,451.55	94.86	10/9 4	326 27.93
Oct. 9th, 1906		214.00		299.60		278.20				
32			188.02	225.72	525.32	216.32	494.52	30.80	10/12 4	323 9.06
Oct. 16th, 1906	26.07			40.84		36.89				
33		327.15		458.85		426.07				
			351.02	421.32	921.01	403.76	866.72	54.29	10/18 4	317 15.88

Forward	232,518.01	97,979.10	27,086.13		639,744.09		584,939.57	54,804.52		26,866.40
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	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time	Interest
									Yrs. Days	
Forward	232,518.01	97,979.10	27,086.13		639,744.00		584,939.57	54,804.52		26,866.49
Oct. 23rd, 1906		418.18		586.46		544.57				
34			280.03	336.18	922.64	322.17	866.74	55.90	10/25 4 310	16.30
Nov. 2nd, 1906		217.09		304.43		282.68				
35			590.18	709.08	1,013.51	679.53	962.21	51.30	11/8 4 296	14.83
Nov. 16th, 1906		224.16		314.72		292.24				
36			327.03	392.58	707.30	376.22	668.46	38.84	11/20 4 284	11.17
Nov. 23rd, 1906		178.12		250.04		232.18				
37			470.02	564.12	814.16	540.61	772.79	41.37	11/27 4 277	11.82
Dec. 2nd, 1906			858.13	1,030.38	1,030.38	987.44	987.44	42.94	12/8 4 266	12.17
38										
Dec. 9th, 1906	117.07			181.89		164.29				
39			403.01	483.66	665.55	463.50	627.79	37.76	12/13 4 261	10.71
Dec. 16th, 1906	118.06			183.37		165.62				
40			472.06	566.76	750.13	543.15	708.77	41.36	12/20 4 254	11.67
Dec. 23rd, 1906	320.12			496.93		448.84				
41			363.05	435.90	932.83	417.74	866.58	66.25	12/27 4 247	18.62
Jan. 1st, 1907	403.13			625.66		565.11				
42			446.19	536.34	1,162.00	513.99	1,079.10	82.90	1/8 4 235	23.15
Jan. 9th, 1907	25.00			38.75		35.00				
43			168.15	202.50	241.25	194.06	229.06	12.19	1/12 4 231	3.39
Jan. 16th, 1907	177.10			275.13		248.50				
2		173.07		242.69		225.35				
			326.08	391.68	909.50	375.36	849.21	60.29	1/19 4 224	16.71
Jan. 23rd, 1907	566.09			878.00		793.03				
3		127.02		177.94		165.23				
			363.19	436.74	1,492.68	418.54	1,376.80	115.86	1/26 4 217	32.61
Feb. 2nd, 1907	776.07			1,203.34		1,086.89				
4		275.09		385.63		358.08				
			805.02	966.12	2,555.00	925.86	2,370.83	184.26	2/9 4 203	50.44
Feb. 8th, 1907	356.00			551.80		498.40				
5		203.08		284.76		264.42				
			238.02	285.72	1,122.28	273.81	1,036.63	85.65	2/13 4 199	23.41
Feb. 16th, 1907	216.02			334.96		302.54				
6		122.19		172.13		159.83				
			120.00	144.00	651.00	138.00	606.37	50.72	2/19 4 193	13.81
Feb. 23rd, 1907	598.17			928.22		838.39				
7		426.15		597.45		554.77				
			562.14	675.24	2,200.91	647.10	2,049.26	160.65	2/28 4 184	43.50
Forward	236,194.04	100,348.05	33,884.03		656,915.39		600,982.61	55,932.78		27,180.20

	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time	Interest
									Yrs. Days	
Forward	236,194.04	100,348.05	33,884.03		656,915.39		600,982.61	55,932.78		27,180.20
March 2nd, 1907	961.15			1,490.71		1,346.45				
8		496.01		694.47		644.86				
			357.11	429.06	2,614.24	411.18	2,402.49	211.75	3/9 4 175	59.00
March 9th, 1907	510.10			791.28		714.70				
9		242.02		338.94		314.73				
			145.01	174.06	1,304.28	166.81	1,196.24	108.04	3/12 4 172	29.02
March 16th, 1907	509.02			789.11		712.74				
10		302.01		422.87		392.66				
			132.11	159.06	1,371.04	152.43	1,257.83	113.21	3/19 4 165	30.28
Mar. 23rd, 1907	1,680.05			2,604.39		2,352.35				
11		587.08		822.36		763.62				
			484.16	581.76	4,008.51	557.52	3,673.49	335.02	3/26 4 158	89.23
April 2nd, 1907	2,772.02			4,296.76		3,880.94				
12		777.03		1,088.01		1,010.29				
			776.04	931.44	6,316.21	892.63	5,783.86	532.35	4/6 4 147	140.79
April 9th, 1907	341.10			529.33		478.10				
13		81.17		114.59		106.40	584.50	59.42	4/11 4 142	15.68
April 16th, 1907	610.08			946.12		954.56				
14		246.13		345.31	1,291.43	320.64	1,175.20	116.23	4/18 4 135	30.50
April 23rd, 1907	514.16			797.94		720.72				
15		375.02		525.14		487.63				
			123.06	147.96	1,471.04	141.80	1,350.15	120.89	4/25 4 128	31.59
May 2nd, 1907	746.04			1,156.61		1,044.68				
16		623.19		873.53		811.13				
			696.00	835.20	2,865.34	800.40	2,656.21	209.13	5/7 4 116	54.23
May 9th, 1907	229.11			355.80		321.37				
17		177.04		248.08		230.36				
			166.18	200.28	804.16	191.94	743.67	60.49	5/11 4 112	15.64
May 16th, 1907	227.19			353.32		319.13				
18		530.11		742.77		689.71				
			421.17	506.22	1,692.31	485.13	1,493.97	108.34	5/18 4 105	27.89
May 23rd, 1907	362.07			561.64		507.29				
19		445.13		623.91		579.34				
			308.02	369.72	1,555.27	354.32	1,440.95	114.32	5/27 4 96	29.26
June 2nd, 1907	691.00			1,071.05		967.40				
20		485.06		679.42	1,750.47	630.89	1,598.29	152.18	6/8 4 84	38.65
June 9th, 1907	319.00			494.45		446.60				
21		121.06		169.82	664.27	157.69	604.29	59.98	6/13 4 79	15.18
June 16th, 1907,	595.03			922.48		833.21				
22		175.14		245.98	1,168.46	228.41	1,061.62	106.84	6/20 4 72	26.92
				298.38	298.38	269.50	269.50	28.88	6/27 4 65	7.25
June 23rd, 1907	192.10									
23				299.62		270.62				
July 2nd, 1907	193.06			431.27	730.89	400.47	671.09	59.80	7/9 4 53	14.88
24		308.01								
Forward	247,651.12	106,324.06		37,496.09@1.20	687,687,375.61		628,945.96	58,429.65		27,836.19
Deduct a/c of claims paid and errors as per agreement	780.17	272.17		87,731.19@1.25	2,000.34		2,000.34	193.20		85.55
	246,870.15	106,051.09		87,250.00@1.25	685,375.27		626,945.62	58,236.45		27,750.64



3

TUESDAY, November 12, 1912—10 a. m.

Present: Parties as before.

Mr. Glasgow and Mr. Platt argued further the questions raised in defendant's points for charge.

*Charge of the Court.*

DR. JAMES B. HOLLAND, J.:

Gentlemen of the Jury: The plaintiff in this case, Henry E. Meeker, surviving partner of the firm of Henry E. Meeker and Carone H. Meeker, doing business under the trade name of Meeker & Company, vs. The Lehigh Valley Railroad Company, instituted suit there upon two Reports made by the Interstate Commerce Commission. The suit is based, Gentlemen of the Jury, upon those Reports and upon the amounts which the Reports show were awarded by the Commission against the defendant in favor of the plaintiff, for alleged discrimination under the Interstate Commerce Act, Section 1, and for the collection of unreasonable rates for the transportation of coal, the total amount of which, together with interest, is \$107,555.58, with interest from the 1st day of August, 1912, amounting, claimed by the plaintiff, to a sum equal to \$109,280.17. As I have said, Gentlemen of the Jury, this suit is brought to recover on an award made by the Interstate Commerce Commission to this plaintiff against the Lehigh Valley Railroad Company, as reparation for the collection of freights which, it was claimed, was in violation of the Interstate Commerce Act. It appears that the plaintiff was transporting coal over the Lehigh Valley Railroad from what is known as the Wyoming coal fields in Pennsylvania to New York, by way of Perth Amboy, from the 1st of August, 1900, until August 1, 1907.

Mr. GLASGOW: From August 1, 1901, to July 17, 1907, your Honor.

The COURT: To July 17, 1907, for which period the complaint was made before the Interstate Commerce Commission.

Mr. GLASGOW: If you will permit me, your Honor, I misled you; from November 1, 1900, to August 1, 1901, was the charge of discrimination.

The COURT: But including both suits it was what?

Mr. GLASGOW: It was from November 1, 1900, to July 17, 1907.

The COURT: The plaintiff, then, was engaged in transporting coal over the Lehigh Valley from the Wyoming fields to New York by the way of Perth Amboy, for the period from November 1, 1900, to the 17th day of July, 1907, for which period complaint was made by the plaintiff before the Interstate Commerce Commission, and a claim for damages was made before that Commission, as he had a right to do, and for a period between November 1, 1900, and August 1, 1901, he claimed a certain amount for discrimination made against him by this defendant Company, according to the evidence, in that there were certain rates given to the plaintiff's competitor, transporting coal from the same point to the same destina-

tion over the same railroad, less than this plaintiff was given, and, as the result, that this plaintiff was damaged in the amount of \$11,009.33 for that period. Plaintiff also alleged that, from the first day of August, 1901, to July 17, 1907, the schedule rates of the Lehigh Valley Railroad Company, the defendant, were too high and were unreasonable, and the Commission, according to the Report offered in evidence here, investigated that question and they found 195 according to that report, that the rates on coal, as scheduled on its tariff and charged to all shippers from the Wyoming Region to Perth Amboy over this Railroad, were too high. That \$1.55 for prepared sizes, \$1.40 for pea coal and \$1.20 for buckwheat was too high, and that it was unreasonable, and that the Railroad Company only should have charged \$1.40 for prepared sizes, \$1.30 for pea coal and \$1.15 for buckwheat, and, therefore, taking into consideration the number of tons that this plaintiff shipped during the period from August 1, 1901 to July 17, 1907, that the plaintiff had been damaged in the sum of \$58,236.45, and the Commission awarded these two amounts to the plaintiff, to wit, \$11,009.33 and \$58,236.45, with interest from the period when the damage accrued, down to the time that the Commission filed their Report, which, as I have said to you totals up the sum of \$107,465.58, to which the plaintiff claims he is entitled to have interest added from August 1, 1912.

That is the claim, Gentlemen of the Jury, and, as I have said, it is based upon the Reports of the Interstate Commerce Commission. The plaintiff had a right to go before the Interstate Commerce Commission and I instruct you that in this case the Interstate Commerce Commission had a right to act. They had a right to act in this case. When the Interstate Commerce Commission takes jurisdiction and acts upon a complaint of a shipper under the Interstate Commerce Act, it is authorized by that Act to do certain things, first, it is authorized to investigate whether there has been an injury, as alleged in the petition, and, if so, to award damages, and then there is a certain procedure pointed out by this Act by which the plaintiff can recover the damages which the Commission awards. When a shipper concludes that he has been injured by a railroad company in the matter of transportation and goes before the Commission, the Commission is authorized by the Interstate Commerce Act to 196 investigate, "and when an investigation shall be made by the said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirements in the premises, and, in case damages are awarded, such report shall include findings of fact on which the award is made." It is objected here, Gentlemen of the Jury, that these reports made by the Commission, upon which this suit is based, are not in accordance with the requirements of this Act and, therefore, you should find for the defendant. But I instruct you, Gentlemen of the Jury, that they are, in the judgment of the Court, in accordance with the requirements of this Section. They state the conclusions as required by the Act and they state the findings of fact upon which the award is based,

and they make that award in the sums that I have mentioned, upon sufficient findings of fact to sustain this suit.

The Act further directs, Gentlemen of the Jury, when the Commission has investigated an alleged injury presented to it by a shipper and has come to the conclusion that the shipper has been injured and has made an award of reparation for the injury done, fixing the amount, it makes a report and directs the railroad company to pay the shipper that amount. If the railroad company refuses to obey that order, the law gives the Commission no authority to compel the railroad to make that payment. The railroad, so far as the Commission is concerned, may refuse to pay; but the Act of Congress says that, if the railroad refuses to pay the amount awarded by the Commission, the plaintiff may come into a Circuit Court of the United States within one year after that award was made and that Court may hear the case before a Jury and, if found to be a just claim through a verdict of a Court and a Jury, that then the collection of it against the railroad company can be had the same as

any other claim of indebtedness which may be collected in  
 197 a court of justice. In the presentation of this claim to the Court and the Jury, the Act of Congress gives the Report a certain character as evidence. Congress, while it authorizes the Interstate Commerce Commission to investigate these alleged grievances and to ascertain whether a shipper has been injured and in what amount, and to award what, in their judgment, is a proper amount, yet requires that, if it is not paid by the defendant, the defendant shall have its day in court before a Jury for the purpose of ascertaining whether or not it is liable, as found by the Interstate Commerce Commission, in accordance with the forms of procedure directed by the Constitution. But in that proceeding the suit is on the Report of the finding of the Interstate Commerce Commission and their finding is made *prima facie* evidence of the correctness of the amount the plaintiff is entitled to recover, and, in a suit on an award of the Interstate Commerce Commission, the plaintiff, when it comes into court, must show that there was such a complaint made before the Interstate Commerce Commission, must show what the Interstate Commerce Commission did by way of its conclusion and award and that it has not been paid, and that makes its *prima facie* case of its right to claim. If the defendant company desires, it may go into the question and show that the finding was wrong. It can take up the merits of the case. It can go into the whole defense, whatever defense it may have against the collection of this claim, if it sees fit to do so. But, if it does not see fit to do so, then the Report of the Commission is *prima facie* evidence of its correctness, and when not paid, entitles the plaintiff, in the absence of any controlling circumstances or evidence to the contrary, to judgment before a Jury for the amount of his claim.

Now *prima facie* evidence is such evidence as, in the judgment of law, is sufficient to establish the fact, and, if not rebutted, remains sufficient for that purpose. It may be rebutted by direct, controlling evidence, or by discriminating circumstances; otherwise, it becomes conclusive of the law; that is, it should oper-



ate upon the minds of the Jury as decisive to found their verdict as to the fact; that is, as to the amount of the claim presented here by the plaintiff. There is no evidence in this case but the plaintiff's evidence, the Report of the Commission, the fact that it is not paid, and the other collateral evidence which was in support, or which was part of the history of the case, as to how it got here. So that the only evidence before you is the prima facie evidence of these claims and, unless there is something in the circumstances which would, in your judgment, contradict the prima facie effect which this evidence is given by law, it would be your duty to find in favor of the plaintiff for the amount which he claims.

Now, Gentlemen of the Jury, the question of the Statute of Limitations has been raised here, but I instruct you that you will have nothing to do with the question of the Statute of Limitations. The matter of its application is not a matter of fact, but it is a matter of law to be considered by the Court, and, for the present, the Court instructs you that there is no Statute of Limitations which bars the recovery of the plaintiff for either of the amounts presented in this suit, and that, if you take the evidence which is made prima facie by the Act of Congress as conclusive of the claim, it will be your duty to render a verdict in favor of the plaintiff for the full amount for both.

The plaintiff asks me to charge you in accordance with certain points.

Mr. GLASGOW: I withdraw those, if your Honor please.

The COURT: The defendant asks me to charge you on certain points, all of which I refuse without reading to the Jury.

Mr. PLATT: Will your Honor allow me to take certain exceptions to your Charge?

199 We except first to the statement of the Court in the Charge that the plaintiff has instituted this suit upon two Reports.

Exception noted as requested by direction of the Court.

To the statement that the suit is based on the Reports and the order.

Exception noted as requested by direction of the Court.

Also to the statement that the suit was brought to enforce the award of the Commission.

Exception noted as requested by direction of the Court.

Also to the statement that the Commission, according to the Report, found that the rates charged to all shippers from the Wyoming Region to Perth Amboy were too high and unreasonable.

Exception noted as requested by direction of the Court.

Also to the statement that the Commission found that the rates of \$1.40 for prepared sizes, \$1.30 for pea coal and \$1.15 for smaller sizes were reasonable.

Exception noted as requested by direction of the Court.

Also to the statement that the Commission found that Meeker sustained damage, or found Meeker damaged.

Exception noted as requested by direction of the Court.

Also to the statement of the Court that this suit is based on the Report of the Interstate Commerce Commission.



Exception noted as requested by direction of the Court.

200 Also to the statement that the plaintiff had the right to go before the Commission and that the Commission had the right to act in the case.

Exception noted as requested by direction of the Court.

Also to the statement that the Reports and orders of the Commission are in accordance with the language which the Court read from Section 14 of the Act.

Exception noted as requested by direction of the Court.

Also to the statement that the Reports state sufficient findings of fact to sustain this suit.

Exception noted as requested by direction of the Court.

Also to the statement that the Interstate Commerce Act gives the Report a certain effect as evidence.

Exception noted as requested by direction of the Court.

Also to the statement that the Act provides that the defendant shall have its day in court.

Exception noted as requested by direction of the Court.

Also to the statement that the Act provides that the defendant shall have a trial according to the Constitution.

Exception noted as requested by direction of the Court.

Also to the statement that the plaintiff has only to show that an award was made by the Commission and was not paid, and that makes a prima facie case.

Exception noted as requested by direction of the Court.

Also to the statement that the award and the fact that it is not paid proves the plaintiff's case.

201 The COURT: I did not say that.

Mr. PLATT: Perhaps I have misquoted your Honor. I will withdraw that. I do not want, of course, to except to something your Honor says you did not say.

The COURT: I did not exactly put it in that way, but you may leave it that way and get what I did say.

Mr. PLATT: We will correct it from the notes.

(The following sentence is referred to: "But in that proceeding the suit is on the Report of the finding of the Interstate Commerce Commission and their finding is made prima facie evidence of the correctness of the amount the plaintiff is entitled to recover, and, in a suit on an award of the Interstate Commerce Commission, the plaintiff, when it comes into court, must show that there was such a complaint made before the Interstate Commerce Commission, must show what the Interstate Commerce Commission did by way of its conclusion and award, and that it has not been paid, and that makes its prima facie case of its right to claim.")

Mr. PLATT: I except also to the statement that, if the defendant does not see fit to do so—that is, to go into the case—then the Report of the Commission is prima facie evidence of its correctness and entitles the plaintiff, in the absence of controlling circumstances or evidence, to judgment.

Exception noted as requested by direction of the Court.

Also to the statement that, unless there is something in the cir-

cumstances which, in the Jury's judgment, would control the effect which is given to this evidence, it would be the Jury's duty to find for the plaintiff for the amount which he claims.

Exception noted as requested by direction of the Court.

202 Also to the statement that the Jury has nothing to do with the question of the Statute of Limitations.

Exception noted as requested by direction of the Court.

Also to the statement that there is no Statute of Limitations which bars the recovery of the plaintiff for either of the claims in this suit, and it will be the Jury's duty to find the full amount for both of the claims.

Exception noted as requested by direction of the Court.

Also to the statement that "it is objected that the Reports are not in accordance with the requirements of this Act, but I instruct you that they are in accordance with the provisions of the Act."

Exception noted as requested by direction of the Court.

Also to the statement that the Reports state the conclusions and findings upon which this award is based.

Exception noted as requested by direction of the Court.

Also to the statement that the award is based upon sufficient findings of fact to sustain this suit.

Exception noted as requested by direction of the Court.

The points for Charge submitted by defendant, which were refused by the Court without reading them to the Jury, are as follows:

"Upon the whole case, the verdict must be for the defendant."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

203 "The order and reports on which the petitioner relies, both for the establishment of his case in this Court and for the jurisdiction of this Court in this action, are invalid, unconstitutional and void, in that they deprive the defendant of due process of law, it not being within the power of Congress to provide by legislative enactment that the Interstate Commerce Commission can make findings upon which there may be a claim for a reparation of damages to a petitioner before that body, and then provide that on the trial of a suit to recover such alleged damages the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and, therefore, the verdict must be for the defendant."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

"The order and findings of the Commission were invalid and unconstitutional, in that they have the effect to deprive the defendant of its constitutional right to a trial by Jury. The order and findings assume to take from the Court its judicial powers to determine the rules of law governing the proceedings in this case, especially the rule of damages applicable to the case; and further, in effect, impose upon this Court, as evidence in this case, that which is not legal evidence; and further, to impose upon this Court as findings of the

Commission, conclusions not based on findings, and therefore the verdict must be for the defendant."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

"The order and findings upon which the plaintiff's case rests are invalid, because on their face they purport to regulate commerce which was completed before the time when the order was  
204 made, and which, therefore, was not subject to regulation at that time; it not being within the power of Congress to provide by legislative enactment that the Interstate Commerce Commission can make findings upon which there may be a claim for a reparation of damages to a petitioner before that body, and then provide that on the trial of a suit to recover such alleged damages the findings and order of the Commission shall be prima facie evidence of the facts therein stated; the power to regulate commerce does not include the power to dispose of proceeds of past transportation transactions. The power to prescribe what shall be a reasonable charge for interstate transportation does not include the power to say what shall be done with the money collected from shippers in the past, and, therefore, the verdict must be for the defendant."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

"The award made in the reparation order is not based on the findings of fact required by the Act, as the Act requires that, in case damages are awarded, such reports shall include the findings of fact on which the award is made; and the report contains no finding of fact to support a conclusion that any of the rates charged the plaintiff prior to July 17, 1907, were unreasonable, and, therefore, the verdict must be for the defendant."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

"It appears on the face of the order and in the Report that the total amount awarded by the Interstate Commerce Commission was the sum of several amounts claimed on several separate shipments of coal between November 1, 1900, and July 17, 1907, and  
205 that each such shipment was the basis of a separate cause of action. There was no finding by the Commission as to the several amounts due upon the several causes of action, and, therefore, the verdict should be for the defendant."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

"There is no evidence before the Court of any discrimination on the part of the defendant, as charged in the petition, from November 1, 1900, to August 1, 1901, and the alleged causes of action referred to in Paragraph III of the petition, as having arisen through acts of discrimination on the part of the defendant, occurring from November 1, 1900, to August 1, 1901, have not been proved and

are not sustained by the findings of the Commission, or by any evidence before this Court, and, therefore, the petitioner cannot recover upon any of the alleged items of damage for shipments prior to August 1, 1901."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

"There is no evidence showing, or tending to show, that the petitioner was in any way damaged, or could have been damaged, by the alleged acts of discrimination charged to have been performed by the defendant between November 1, 1900, and August 1, 1901, and, therefore, the petitioner cannot recover upon any of the alleged items of damages for shipments prior to August 1, 1901."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

206 "There is no competent evidence in this case, either by way of findings or statements or evidence of any kind, that the rates charged by the defendant railroad for transporting coal to Perth Amboy, from August 1, 1901, to July 17, 1907, were unreasonable, unjust or excessive, and, therefore, the petitioner cannot recover for any of the items of damage for shipments between August 1, 1901, and July 17, 1907."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

"There is no competent evidence, either by way of findings or statements or any other evidence in this case, that the petitioner was in any way damaged by the alleged imposition of unreasonable rates on the part of the railroad, between August 1, 1901, and July 17, 1907, and, therefore, the petitioner cannot recover for items of damages on shipments between August 1, 1901, and July 17 1907."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

"There is no competent evidence either by way of findings or statements, or any other evidence in this case, that the reduced rates on which the amount of the alleged reparation is computed, were at any time between August 1, 1901 and July 17, 1907, reasonable or duly compensatory, and, therefore, the petitioner cannot recover on any of the items of damages for shipments between August 1, 1901, and July 17, 1907."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

207 "The order and findings do not show that petitioner has been injured. On the contrary, they show that the award of reparation to him is a discrimination in his favor against other shippers, and a judgment in his favor would constitute such discrimination; therefore, the verdict should be for the defendant."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

"Inasmuch as it appears that petitioner was charged and paid the correct tariff rates, according to tariffs duly filed pursuant to Section 6 of the Act, therefore, petitioner cannot recover back any part of the freights so paid to the railroad; and, therefore, the verdict should be for the defendant."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

"The order and Reports upon which petitioner rests his case are invalid and void, because in the proceedings before the Commission, the Commission failed to give to the defendant railroad the hearing provided for in the Interstate Commerce Act, which said hearing, the Act provides, shall be a condition precedent to the making of any valid order or findings, and, therefore, the verdict should be for the defendant."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

"Since this suit is for the recovery of penalties for alleged violations of the Act to Regulate Commerce, recovery is barred by the Federal Statute of Limitations, Section 1047 of the Revised Statutes, which provides that such suits must be brought within five years of the date that the cause of action accrued, and, therefore, the verdict must be for the defendant."

208 To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

"The plaintiff cannot recover as to the items of alleged damages on shipments between November 1, 1900 and August 1, 1901, because the same are barred by the Federal Statute of Limitations, Section 1047, of the Revised Statutes, and as to such items this suit being instituted for the purpose of recovering a penalty."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

"The plaintiff cannot recover as items of alleged damages on any of the shipments prior to June 29, 1906, because Section 16 of the Interstate Commerce Act provides that 'claims accrued prior to the passage of this Act may be presented within one year,' and the complaint before the Commission was not presented within one year from the passage of the Act of June 29, 1906, and, therefore, the Interstate Commerce Commission had no jurisdiction over any of the said items for alleged damages prior to June 29, 1906."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

"Plaintiff cannot recover as to alleged items of damages on shipments prior to July 17, 1905, because Section 16 of the Interstate

Commerce Act provides that 'all complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues and not after,' and this two-year limitation applies to cut off from the jurisdiction of the Commission all the petitioner's shipments made prior to said July 17, 1905, because the complaint before the Commission was not filed within one year from the date of the passage of the Act of June 29, 1906."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

"The plaintiff cannot recover as to items of alleged damages upon shipments prior to August 28, 1904, because Section 16 of the Interstate Commerce Act provides that 'all complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues and not after,' but with the proviso that claims accrued within two years prior to the passage of the Act of 1906 may be presented within one year."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

"The plaintiff cannot recover any sums representing items of alleged damages for shipments of coal prior to September 3, 1906, because as to any items of alleged damages for shipments of coal theretofore, they are barred by the Statute of Limitations of Pennsylvania, limiting actions in trespass to matters 'arising within six years from the date of the institution of the suit.'"

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

"Plaintiff cannot recover as to items of damages on shipments prior to July 17, 1901, because as to any such items he is barred by the Pennsylvania Statute of Limitations applicable to such claims."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

210 "The Jury must disregard anything in the Reports and orders as to the reasonableness of the rates at the time of the Report of June 8, 1911, and thereafter. There is no finding that the rates were unreasonable at any time prior to July 17, 1907, and, therefore, the verdict must be for the defendant."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

"It appears on the face of the Reports that the Commission drew conclusions from the evidence before it which conclusions were controlling in the proceedings before the Commission, and were, as a matter of law, incorrect and improper conclusions; said conclusions being (a) the conclusion that there was a discrimination as to shipments from November 1, 1900, to August 1, 1901; and (b) the conclusion as to reasonableness of rates."



To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

Mr. Warren, of counsel for the defendant, requested the Learned Judge to direct the stenographer to reduce the testimony and Charge to typewriting and file the same of record in the cause, which request was granted and the stenographer so directed.

The Jury rendered a verdict in favor of the plaintiff for \$109,280.17.

And thereupon the counsel for the said defendant did then and there except to the aforesaid charge and opinion of the said  
211 Court, to the action of the said Court upon the objections made by them on behalf of the defendant and the admission of evidence offered on behalf of the plaintiff as aforesaid, and to the refusal of defendant's points, and inasmuch as the said charge and opinion and the action of the Court as aforesaid so excepted to do not appear upon the record:

The said counsel for the said defendant did then and there tender this bill of exceptions to the opinion and action of the said Court, and requested that the seal of the Judge aforesaid should be put to the same, according to the form of the statute in such case made and provided.

And thereafter on the 19th day of December, 1912, the Court entered the following order:

"And now, to wit, this 19th day of December, 1912, it is ordered that defendant's motion for new trial be refused and the judgment be entered on the verdict; and the plaintiff having presented to the Court the record in this case before the Interstate Commerce Commission and upon oral statement in open Court, in the presence of counsel for the defendant as to the services performed before the Interstate Commerce Commission and in this Court:

"Further ordered that counsel for plaintiff be allowed a counsel fee of \$10,000 for their services in the proceedings before the Interstate Commerce Commission, and a further fee of \$10,000 for their services in the proceedings in this Court;

"Further ordered that an exception be granted to the allowance by the Court of a fee to counsel for plaintiff for services in the proceedings before the Interstate Commerce Commission, and also to the allowance of a fee for services in this Court."

And thereafter, on motion of the plaintiff, judgment was  
212 entered in favor of the plaintiff and against the defendant in said cause in the sum of \$109,280.17.

And thereupon the aforesaid Judge, at the request of the said counsel for the defendant, did put his seal to this Bill of Exceptions, pursuant to the aforesaid statute in such case made and provided, this 30th day of December, A. D. 1912.

JAMES B. HOLLAND. [SEAL.]



*Order of Court Refusing New Trial, Etc.*

Filed December 19, 1912.

Before Holland, J.

And now, to wit, this 19th day of December, 1912, it is ordered that defendant's motion for new trial be refused and judgment be entered on the verdict; and the plaintiff, having presented to the Court the record in this case before the Interstate Commerce Commission and upon oral statement in open Court, in the presence of counsel for the defendant as to the services performed before the Interstate Commerce Commission and in this Court,

Further ordered that counsel for plaintiff be allowed a counsel fee of Ten Thousand (\$10,000) Dollars for their services in the proceedings before the Interstate Commerce Commission, and a further fee of Ten Thousand (\$10,000) Dollars for their services in the proceedings in this Court;

Further ordered that an exception be granted to the allowance by the Court of a fee to counsel for plaintiffs for services in the proceedings before the Interstate Commerce Commission, and also to the allowance of a fee for services in this Court.

BY THE COURT.

Attest:

GEORGE BRODBECK,  
*Deputy Clerk.*

213

*Præcipe for Judgment.*

Filed December 19, 1912.

To the Clerk of the Said Court:

Enter judgment in favor of plaintiff and against defendant in the sum of One Hundred and Nine Thousand Two Hundred and Eighty Dollars and Seventeen Cents, as per verdict of the jury.

WM. A. GLASGOW, JR.,  
*Attorney for Plaintiff.*

*Judgment.*

Before Holland, J.

And now, this 19th day of December, 1912, in accordance with præcipe filed, judgment is hereby entered on the record in the above case, in favor of the plaintiff and against the defendant, in the sum of \$109,280.17.

LEO A. LILLY,  
*Deputy Clerk.*

*Petition for Writ of Error.*

Filed December 30, 1912.

The Lehigh Valley Railroad Company, the defendant in the above entitled cause, being aggrieved by the final judgment made and entered by the Court in the above entitled cause, on the 19th day of December, A. D. 1912, wherein it was adjudged that the plaintiff shall recover therein against the defendant the sum of \$109,280.17, with interest from the 12th day of November, 1912,

214 and that counsel for the plaintiff shall receive from the defendant as counsel fee for their services before the Interstate Commerce Commission in the proceeding before that Commission entitled Henry E. Meeker and Caroline Meeker, co-partners, etc., against Lehigh Valley Railroad Company, No. 1180, the sum of \$10,000, and as further counsel fee for their services before the United States District Court for the Eastern District of Pennsylvania, in this cause the sum of \$10,000, comes now by its attorneys, Everett Warren, Frank H. Platt, Edgar H. Boles and John G. Johnson, and petitions the Court for an order allowing said defendant to prosecute a writ of error from the said judgment to the Circuit Court of Appeals of the United States for the Third Circuit, in accordance with the laws of the United States in such case made and provided; and also that an order be made fixing the amount of security which defendant shall furnish upon such writ of error, and that upon giving such security all further proceedings of this Court shall be stayed until the determination of said writ of error by the said United States Circuit Court of Appeals for the Third Circuit.

And your petitioner will ever pray, etc.

EVERETT WARREN,  
FRANK H. PLATT,  
EDGAR H. BOLES,  
JOHN G. JOHNSON.

*Attorneys for Petitioner,*

Per J. W. BAYARD.

Dec. 27, 1912.

*Order of Court.*

Filed December 30, 1912.

Before Holland, J.

And now, December 30th, 1912, on motion of Everett Warren, Frank H. Platt, Edgar H. Boles and John G. Johnson, attorneys for defendant,

215 It is ordered that a writ of error to the United States Circuit Court of Appeals for the Third Circuit from the final judgment heretofore filed and entered in the above entitled cause be and the same is hereby allowed, and that a certified transcript of

the record and of the proceedings herein be forthwith transmitted to the said Court.

And it is further ordered that the bond for damages and costs in said appeal be and the same is hereby fixed at \$218,560.34.

BY THE COURT.

Attest:

GEORGE BRODBECK,  
*Deputy Clerk.*

*Assignments of Error.*

Filed Dec. 30, 1912.

And now comes the defendant, Lehigh Valley Railroad Company, and files the following Assignments of Error, upon which it will rely upon its prosecution of the Writ of Error in the above-entitled case:

1. The learned trial Judge erred in admitting in evidence the report of the Interstate Commerce Commission, dated June 8, 1911, in the proceeding before that Commission, entitled Henry E. Meeker and Caroline H. Meeker, co-partners, etc., against Lehigh Valley Railroad Company, No. 1180. (Record, p. 107.)

2. The learned trial Judge erred in admitting in evidence the order of the Interstate Commerce Commission, dated June 8, 1911, in the proceeding before that Commission, entitled Henry E. Meeker and Caroline H. Meeker, co-partners, etc., against Lehigh Valley Railroad Company, No. 1180. (Record, p. 107.)

216 3. The learned trial Judge erred in admitting in evidence the report of the Interstate Commerce Commission, dated May 7, 1912, in the proceeding before that Commission, entitled Henry E. Meeker and Caroline H. Meeker, co-partners, etc., against Lehigh Valley Railroad Company, No. 1180. (Record, p. 115.)

4. The learned trial Judge erred in admitting in evidence the order of the Interstate Commerce Commission, dated May 7, 1912, in the proceeding before that Commission, entitled Henry E. Meeker and Caroline H. Meeker, co-partners, etc., against Lehigh Valley Railroad Company, No. 1180. (Record, p. 116.)

5. The learned trial Judge erred in admitting in evidence the order of the Interstate Commerce Commission, dated June 15, 1912, in the proceeding before that Commission entitled Henry E. Meeker and Caroline H. Meeker, co-partners, etc., against Lehigh Valley Railroad Company, No. 1180. (Record, p. 116.)

6. The learned trial Judge erred in admitting the following testimony of witness Henry E. Meeker:

"On that occasion I asked Mr. Taylor if the new rate to the independent operators of 65% became operative, if we would get the 35% rate, and he said 'of course.' He said I would get the same as all. We were talking about the same as everybody else was getting at that time." (Record, p. 85.) "Q. Can you state to the jury when the arrangement or agreement by which the average adjust

ment of rates on the 65% basis instead of 60 was made effective by the Lehigh Valley Railroad Company? A. August 1, 1901. Q. For what period of time did it then apply, the 65% basis. A. From November 1, 1900, to August 1, 1901." (Record, p. 129.) "Q.

Can you tell the Court and jury what amount you paid to the Lehigh Valley Railroad Company during the period from November 1st, 1900, to August 1st, 1901, on shipments of coal from the Wyoming region to Perth Amboy? A. \$129,989.18."

(Record, p. 88.) "Q. Can you tell me what was the amount you would have paid on the same coal covering that period if you had been charged on the basis of 35% of the average selling price at Perth Amboy of coal sold by the Lehigh Valley Coal Company? A. \$118,979.85. Q. What is the difference between the amount you paid and the amount you would have paid on the basis of the question immediately preceding? A. \$11,009.33." (Record, p. 91.)

7. The learned trial Judge erred in admitting in evidence the testimony of witness Henry E. Meeker, as follows:

"Q. Have you calculated what would be the difference between the amounts which you paid and the amounts which would have been paid if you had been charged \$1.40 on prepared sizes, \$1.30 on pea coal, and \$1.15 on buckwheat? A. Yes. Q. Will you please state what it is? A. \$58,236.45." (Record, p. 120.)

8. The learned trial Judge erred in charging the jury as follows.

"The plaintiff in this case, Henry E. Meeker, surviving partner of the firm of Henry E. Meeker and Caroline H. Meeker, doing business under the trade name of Meeker & Company, vs. The Lehigh Valley Railroad Company, instituted suit here upon two reports made by the Interstate Commerce Commission." (Record, p. 193.)

9. The learned trial Judge erred in charging the jury as follows:

"This suit is based, Gentlemen of the Jury, upon those reports and upon the amounts which the reports show were awarded by the Commission against the defendant in favor of the plaintiff." (Record, p. 193.)

10. The learned trial Judge erred in charging the jury as follows:

"This suit is brought to recover on an award made by the Interstate Commerce Commission to this plaintiff against the Lehigh Valley Railroad Company, as reparation for the collection of freights which, it was claimed, was in violation of the Interstate Commerce Act." (Record, p. 193.)

11. The learned trial Judge erred in charging the jury as follows.

"And the Commission, according to the report offered in evidence here, investigated that question and they found, according to that report, that the rates on coal, as scheduled on its tariff and charged to all shippers from the Wyoming region to Perth Amboy over this Railroad, were too high. That \$1.55 for prepared sizes, \$1.40 for pea coal and \$1.20 for buckwheat was too high, and that it was unreasonable, and that the Railroad Company only should have charged \$1.40 for prepared sizes, \$1.30 for pea coal and \$1.15 for buckwheat, and, therefore, taking into consideration the number of tons that this plaintiff shipped during the period from August 1, 1901, to

July 17, 1907, that the plaintiff had been damaged in the sum of \$58,236.45." (Record, p. 194.)

12. The learned trial Judge erred in charging the jury as follows:

"That is the claim, Gentlemen of the Jury, and, as I have said, it is based upon the reports of the Interstate Commerce Commission."  
(Record, p. 195.)

219 13. The learned trial Judge erred in charging the jury as follows:

"The plaintiff had a right to go before the Interstate Commerce Commission and I instruct you that in this case the Interstate Commerce Commission had a right to act. They had a right to act in this case." (Record p. 195.)

14. The learned trial Judge erred in charging the jury as follows:

"It is objected here, Gentlemen of the Jury, that these reports made by the Commission, upon which this suit is based, are not in accordance with the requirements of this Act and, therefore, you should find for the defendant. But I instruct you, Gentlemen of the Jury, that they are, in the judgment of the Court, in accordance with the requirements of this Section. They state the conclusions as required by the Act and they state the findings of fact upon which the award is based, and they make that award in the sums that I have mentioned, upon sufficient finding of fact to sustain this suit."  
(Record p. 196.)

15. The learned trial Judge erred in charging the jury as follows:

"In the presentation of this claim to the Court and the jury, the Act of Congress gives the Report a certain character as evidence. Congress, while it authorizes the Interstate Commerce Commission to investigate these alleged grievances and to ascertain whether a shipper has been injured and in what amount, and to award what, in their judgment is a proper amount, yet requires that, if it is not paid by the defendant, the defendant shall have its day in court before a jury for the purpose of ascertaining whether or not  
220 it is liable, as found by the Interstate Commerce Commission, in accordance with the forms of procedure directed by the Constitution." (Record p. 197.)

16. The learned trial Judge erred in charging the jury as follows:

"But in that proceeding the suit is on the report of the findings of the Interstate Commerce Commission and their finding is made prima facie evidence of the correctness of the amount the plaintiff is entitled to recover, and, in a suit on an award of the Interstate Commerce Commission, the plaintiff, when it comes into court, must show that there was such a complaint made before the Interstate Commerce Commission, must show what the Interstate Commerce Commission did by way of its conclusion and award and that it has not been paid, and that makes its prima facie case of its right to claim." (Record p. 197.)

17. The learned trial Judge erred in charging the jury as follows:

"But, if it (defendant) does not see fit to do so, then the report of the Commission is prima facie evidence of its correctness and, when not paid, entitles the plaintiff, in the absence of any controlling cir-

cumstances or evidence to the contrary, to judgment before a jury for the amount of his claim." (Record p. 197.)

18. The learned trial Judge erred in charging the jury as follows:  
 "So that the only evidence before you is the *prima facie* evidence of these claims and, unless there is something in the circumstances which would, in your judgment, contradict the *prima facie* effect which this evidence is given by law, it would be your duty to find in favor of the plaintiff for the amount which he claims." (Record p. 198.)

19. The learned trial Judge erred in charging the jury as follows:  
 "Now, Gentlemen of the Jury, the question of the Statute of Limitations has been raised here, but I instruct you that you will have nothing to do with the question of the Statute of Limitations. The matter of its application is not a matter of fact, but it is a matter of law to be considered by the Court, and, for the present, the Court instructs you that there is no Statute of Limitations which bars the recovery of the plaintiff for either of the amounts presented in this suit, and that, if you take the evidence which is made *prima facie* by the Act of Congress as conclusive of the claim, it will be your duty to render a verdict in favor of the plaintiff for the full amount for both." (Record p. 198.)

20. The learned trial Judge erred in refusing to charge the jury as requested by the defendant in the points submitted by it, as follows:

"Upon the whole case, the verdict must be for the defendant." (Record p. 202.)

21. The learned trial Judge erred in refusing to charge the jury as requested by the defendant in the points submitted by it, as follows:

"The order and reports on which the petitioner relies, both for the establishment of his case in this Court and for the jurisdiction of this Court in this action, are invalid, unconstitutional and void, in that they deprive the defendant of due process of law, it not being within the power of Congress to provide by legislative enactment that the Interstate Commerce Commission can make findings upon which there may be a claim for a reparation of damages to a petitioner before that body, and then provide that on the trial of a suit to recover such alleged damages the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated, and, therefore, the verdict must be for the defendant." (Record p. 203.)

22. The learned trial Judge erred in refusing to charge the jury as requested by the defendant, in the points submitted by it, as follows:

"The order and findings of the Commission were invalid and unconstitutional, in that they have the effect to deprive the defendant of its constitutional right to a trial by jury. The order and findings assume to take from the Court its judicial powers to determine the rules of law governing the proceedings in this case, especially the rule of damages applicable to the case; and further, in effect, impose



upon this Court, as evidence in this case, that which is not legal evidence; and, further, to impose upon this Court as findings of the Commission, conclusions not based on findings, and therefore the verdict must be for the defendant." (Record p. 203.)

23. The learned trial Judge erred in refusing to charge the jury, as requested by the defendant, in the points submitted by it, as follows:

"The order and findings upon which the plaintiff's case rests are invalid, because on their face they purport to regulate commerce which was completed before the time when the order was made, and which, therefore, was not subject to regulation at that time; it not being within the power of Congress to provide by legislative enactment that the Interstate Commerce Commission can make  
223 findings upon which there may be a claim for a reparation of damages to a petitioner before that body, and then provide that on the trial of a suit to recover such alleged damages the findings and order of the Commission shall be prima facie evidence of the facts therein stated; the power to regulate commerce does not include the power to dispose of proceeds of past transportation transactions. The power to prescribe what shall be a reasonable charge for interstate transportation does not include the power to say what shall be done with the money collected from shippers in the past, and, therefore, the verdict must be for the defendant." (Record p. 203.)

24. The learned trial Judge erred in refusing to charge the jury, as requested by the defendant, in the points submitted by it, as follows:

"The award made in the reparation order is not based on the findings of fact required by the Act, as the Act requires that, in case damages are awarded, such reports shall include the findings of fact on which the award is made; and the report contains no finding of fact to support a conclusion that any of the rates charged the plaintiff prior to July 17, 1907, were unreasonable, and, therefore, the verdict must be for the defendant." (Record p. 204.)

25. The learned trial Judge erred in refusing to charge the jury, as requested by the defendant, in the points submitted by it, as follows:

"It appears on the face of the order and in the report that the total amount awarded by the Interstate Commerce Commission was the sum of several amounts claimed on several separate shipments of coal between November 1, 1900, and July 17, 1907, and  
224 that each such shipment was the basis of a separate cause of action. There was no finding by the Commission as to the several amounts due upon the several causes of action, and, therefore, the verdict should be for the defendant." (Record, p. 204.)

26. The learned trial Judge erred in refusing to charge the jury, as requested by the defendant in the points submitted by it, as follows:

"There is no evidence before the Court of any discrimination on the part of the defendant, as charged in the petition, from November 1, 1900, to August 1, 1901, and the alleged causes of action



referred to in Paragraph III of the petition, as having arisen through acts of discrimination on the part of the defendant, occurring from November 1, 1900, to August 1, 1901, have not been proved and are not sustained by the findings of the Commission, or by any evidence before this Court, and, therefore, the petitioner cannot recover upon any of the alleged items of damage for shipments prior to August 1, 1901." (Record p. 205.)

27. The learned trial Judge erred in refusing to charge the jury, as requested by the defendant in the points submitted by it, as follows:

"There is no evidence showing, or tending to show, that the petitioner was in any way damaged, or could have been damaged, by the alleged acts of discrimination charged to have been performed by the defendant between November 1, 1900, and August 1, 1901, and, therefore, the petitioner cannot recover upon any of the alleged items of damages for shipments prior to August 1, 1901." (Record p. 205.)

225 28. The learned trial Judge erred in refusing to charge the jury, as requested by the defendant in the points submitted by it, as follows:

"There is no competent evidence in this case, either by way of findings or statements or evidence of any kind, that the rates charged by the defendant railroad for transporting coal to Perth Amboy, from August 1, 1901, to July 17, 1907, were unreasonable, unjust or excessive, and, therefore, the petitioner cannot recover for any of the items of damage for shipments between August 1, 1901, and July 17, 1907." (Record, p. 206.)

29. The learned trial Judge erred in refusing to charge the jury, as requested by the defendant in the points submitted by it, as follows:

"There is no competent evidence, either by way of findings or statements or any other evidence in this case, that the petitioner was in any way damaged by the alleged imposition of unreasonable rates on the part of the railroad, between August 1, 1901, and July 17, 1907, and, therefore, the petitioner cannot recover for items of damages on shipments between August 1, 1901, and July 17, 1907." (Record p. 206.)

30. The learned trial Judge erred in refusing to charge the jury, as requested by the defendant in the points submitted by it, as follows:

"There is no competent evidence, either by way of findings or statements, or any other evidence in this case, that the reduced rates on which the amount of the alleged reparation is computed, were at any time between August 1, 1901, and July 17, 1907, reasonable or duly compensatory, and, therefore, the petitioner cannot recover on any of the items of damages for shipments between August 1, 1901, and July 17, 1907." (Record p. 206.)

226 31. The learned trial Judge erred in refusing to charge the jury, as requested by the defendant in the points submitted by it, as follows:

"The order and findings do not show that petitioner has been in-

jured. On the contrary, they show that the award of reparation to him is a discrimination in his favor against other shippers, and a judgment in his favor would constitute such discrimination; therefore, the verdict should be for the defendant." (Record p. 206.)

32. The learned trial Judge erred in refusing to charge the jury, as requested by the defendant in the points submitted by it, as follows:

"Inasmuch as it appears that petitioner was charged and paid the correct tariff rates, according to tariffs duly filed pursuant to Section 6 of the Act, therefore, petitioner cannot recover back any part of the freights so paid to the railroad; and, therefore, the verdict should be for the defendant." (Record p. 207.)

33. The learned trial Judge erred in refusing to charge the jury, as requested by the defendant in the points submitted by it, as follows:

"The order and reports upon which petitioner rests his case are invalid and void, because in the proceedings before the Commission, the Commission failed to give to the defendant railroad the hearing provided for in the Interstate Commerce Act, which said hearing, the Act provides, shall be a condition precedent to the making of any valid order or findings, and, therefore, the verdict should be for the defendant." (Record p. 207.)

34. The learned trial Judge erred in refusing to charge the jury as requested by the defendant in the points submitted by it, as follows:

227 "Since the suit is for the recovery of penalties for alleged violations of the Act to Regulate Commerce, recovery is barred by the Federal Statute of Limitations, Section 1047 of the Revised Statutes, which provides that such suits must be brought within five years of the date that the cause of action accrued, and, therefore, the verdict must be for the defendant." (Record p. 207.)

35. The learned trial Judge erred in refusing to charge the jury, as requested by the defendant in the points submitted by it, as follows:

"The plaintiff cannot recover as to the items of alleged damages on shipments between November 1, 1900, and August 1, 1901, because the same are barred by the Federal Statute of Limitations, Section 1047, of the Revised Statutes, and as to such items this suit being instituted for the purpose of recovering a penalty." (Record p. 208.)

36. The learned trial Judge erred in refusing to charge the jury as requested by the defendant in the points submitted by it, as follows:

"The plaintiff cannot recover as items of alleged damages on any of the shipments prior to June 29, 1906, because Section 16 of the Interstate Commerce Act provides that 'claims accrued prior to the passage of this Act may be presented within one year,' and the complaint before the Commission was not presented within one year from the passage of the Act of June 29, 1906, and, therefore, the Interstate Commerce Commission had no jurisdiction over any of

the said items for alleged damages prior to June 29, 1906." (Record p. 208.)

37. The learned trial Judge erred in refusing to charge the jury as requested by the defendant in the points submitted by it, as follows:

228 "Plaintiff cannot recover as to alleged items of damages on shipments prior to July 17, 1905, because Section 16 of the Interstate Commerce Act provides that 'all complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues and not after,' and this two-year limitation applies to cut off from the jurisdiction of the Commission all the petitioner's shipments made prior to said July 17, 1905, because the complaint before the Commission was not filed within one year from the date of the passage of the Act of June 29, 1906." (Record p. 206.)

38. The learned trial Judge erred in refusing to charge the jury as requested by the defendant in the points submitted by it, as follows:

"The plaintiff cannot recover as to items of alleged damages upon shipments prior to August 28, 1904, because Section 16 of the Interstate Commerce Act provides that 'all complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues and not after,' but with the proviso that claims accrued within two years prior to the passage of the Act of 1906 may be presented within one year." (Record p. 207.)

39. The learned trial Judge erred in refusing to charge the jury as requested by the defendant in the points submitted by it, as follows:

"The plaintiff cannot recover any sum representing items of alleged damages for shipments of coal prior to September 3, 1906, because as to any items of alleged damages for shipments of coal theretofore, they are barred by the Statute of Limitations of Pennsylvania, limiting actions in trespass to matters 'arising within  
229 six years from the date of the institution of the suit.'" (Record p. 209.)

40. The learned trial Judge erred in refusing to charge the jury as requested by the defendant in the points submitted by it, as follows:

"Plaintiff cannot recover as to items of damages on shipments prior to July 17, 1901, because as to any such items he is barred by the Pennsylvania Statute of Limitations applicable to such claims." (Record p. 209.)

41. The learned trial Judge erred in refusing to charge the jury as requested by the defendant in the points submitted by it, as follows:

"The jury must disregard anything in the reports and orders as to the reasonableness of the rates at the time of the report of June 8, 1911, and thereafter. There is no finding that the rates were unreasonable at any time prior to July 17, 1907, and, therefore, the verdict must be for the defendant." (Record, p. 210.)

42. The learned trial Judge erred in refusing to charge the jury as requested by the defendant in the points submitted by it, as follows:

"It appears on the face of the reports that the Commission drew conclusions from the evidence before it, which conclusions were controlling in the proceedings before the Commission, and were, as a matter of law, incorrect and improper conclusions; said conclusions being (a) the conclusions that there was a discrimination as to shipments from November 1, 1900, to August 1, 1901; and, (b) the conclusion as to reasonableness of rates." (Record p. 210.)

230 43. The learned trial Judge erred in allowing counsel for the plaintiffs a fee of \$10,000 for their services to the plaintiffs in the proceeding before the Interstate Commerce Commission, entitled Henry E. Meeker and Caroline H. Meeker, co-partners, etc., against Lehigh Valley Railroad Company, No. 1180. (Record p. 211.)

44. The learned trial Judge erred in allowing counsel for the plaintiffs a fee of \$10,000 for their services to the plaintiffs in this case. (Record p. 211.)

45. The learned trial Judge erred in entering judgment for the plaintiffs upon the verdict. (Record p. 211.)

EVERETT WARREN,  
FRANK H. PLATT,  
EDGAR H. BOLES,  
JOHN G. JOHNSON,

*Attorneys for Defendant,*

Per J. W. BAYARD.

*Stipulation for Record on Writ of Error.*

Filed Dec. 30, 1912.

And now, this 27th day of December, 1912, it is stipulated and agreed that the record sent to the Circuit Court of Appeals on the writ of error allowed in the above entitled cause shall contain:

1. Docket Entries;
  2. Petitioner's statement of claim, with the exhibits attached thereto;
  3. Defendant's plea;
  4. Bill of Exceptions; except the exhibits attached to plaintiff's statement of claim and printed with it;
  - 231 5. Petition for writ of error and order thereon;
  6. Specifications of error;
  7. Bond sur writ of error;
- and no other papers.

WM. A. GLASGOW, JR.,  
*Attorney for Plaintiff.*

EVERETT WARREN,  
FRANK H. PLATT,  
EDGAR H. BOLES,  
JOHN G. JOHNSON,

*Attorneys for Defendant.*

Per J. W. BAYARD.

*Bond Sur Writ of Error.*

Filed Dec. 30, 1912.

Know all men by these presents, That we, Lehigh Valley Railroad Company, as principal, and United States Fidelity and Guaranty Company, as surety, are held and firmly bound unto Henry Eugene Meeker, surviving partner of the firm of Henry E. Meeker and Carolina H. Meeker, doing business under the trade name of Meeker and Company in the full and just sum of Two hundred and eighteen Thousand five hundred and sixty dollars and thirty-four cents, to be paid to the said Henry Eugene Meeker surviving partner as aforesaid his certain attorney, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals and dated this 28th day of December in the year of our Lord one thousand nine hundred and twelve (1912).

Whereas, lately at a session of the United States District Court for the Eastern District of Pennsylvania in a suit depending in said

232 Court between the said Henry Eugene Meeker, surviving partner as aforesaid, plaintiff and the Lehigh Valley Railroad Company, defendant, on the 19th day of December, 1912, to September Sessions, 1912, No. 2146, a judgment was rendered against the said defendant in the sum of One hundred and nine thousand two hundred and eighty dollars and seventeen cents in favor of said plaintiff and the said defendant having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said plaintiff citing and admonishing him to be and appear at a United States Circuit Court of Appeals for the Third Circuit, to be holden at the city of Philadelphia, within thirty days.

Now, the condition of the above obligation is such, that if the said Lehigh Valley Railroad Company shall prosecute its writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of:

LEHIGH VALLEY RAILROAD COMPANY,

By E. B. THOMAS, *President.*

Attest: D. E. BAIRD, *Secretary.* [SEAL.]

UNITED STATES FIDELITY AND GUARANTY CO.,

By HENRY STRAUSS,

*Resident Vice-President.*

Attest: S. LEO HUNT,

*Resident Secretary.* [SEAL.]

Before Holland, J.

Approved by the Court:

Attest: GEORGE BRODBECK, *Deputy Clerk.*

233 UNITED STATES OF AMERICA,  
*Eastern District of Pennsylvania, set:*

I, William W. Craig, Clerk of the District Court of the United States for the Eastern District of Pennsylvania, do hereby certify that the annexed and foregoing is a true and faithful copy of Plea and Proceedings in the case of Henry E. Meeker, surviving partner of the firm of Henry E. Meeker and Caroline H. Meeker, doing business under the trade name of Meeker & Company v. Lehigh Valley Railroad Company, No. 2146, September Session, 1912, a per præcipe filed, a copy of which is hereto attached, now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said District Court at Philadelphia this 30th day of January, in the year of our Lord one thousand nine hundred and thirteen, and in the one hundred and thirty-seventh year of the Independence of the United States.

[SEAL.]

WM. W. CRAIG,  
*Clerk District Court U. S.*

234 *Certified Copy of Proceedings in Circuit Court of Appeals in  
 No. 1721.*

[Seal United States Circuit Court of Appeals, Third Circuit.]

235 In the United States Circuit Court of Appeals for the Third  
 Circuit, March Term, 1913.

No. 1721.

LEHIGH VALLEY RAILROAD CO., Plaintiff in Error,  
 vs.  
 MEEKER & COMPANY, Defendant in Error.

And afterwards, to wit, on the second and third days of April 1913, come the parties aforesaid by their counsel aforesaid, and the case being called for argument sur pleadings and briefs, before the Hon. George Gray, Hon. Joseph Buffington, and Hon. John L. McPherson, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof;

And afterwards, to wit, on the twenty seventh day of August 1913, come the parties aforesaid by their counsel aforesaid, and the Court now being fully advised in the premises, renders the following decision:

236 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1913.

No. 1721.

LEHIGH VALLEY RAILROAD COMPANY, Plaintiff in Error,

vs.

HENRY E. MEEKER, Surviving Partner of the Firm of Henry E. Meeker and Caroline H. Meeker, Doing Business under the Trade Name of Meeker & Company, Defendant in Error.

March Term, 1913.

No. 1720.

LEHIGH VALLEY RAILROAD COMPANY, Plaintiff in Error,

vs.

HENRY E. MEEKER, Defendant in Error.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

Before Gray, Buffington, and McPherson, Circuit Judges.

GRAY, *Circuit Judge*:

On September 3, 1912, Henry E. Meeker, surviving partner of the firm of Meeker & Company, defendant in error (hereinafter called the plaintiff), instituted in the court below, under the  
237 provisions of section 16 of the Act to Regulate Commerce, a suit against the Lehigh Valley Railroad Company, plaintiff in error (hereinafter called the defendant), to recover damages alleged to have been incurred by reason of certain acts and practices of the defendant, in violation of said act, and therefore the subject of complaint by the said plaintiff before the Interstate Commerce Commission.

To the judgment obtained by the plaintiff against the defendant, this writ of error has been sued out by the latter.

In his petition in the court below, "setting forth briefly the causes for which he claims damages," plaintiff charges that the defendant company, as a common carrier, subject to the provisions of the Interstate Commerce Act, from November 1, 1900, to August 1, 1901, discriminated against his firm, in that it demanded and received from Meeker & Company greater compensation for services rendered in the transportation of anthracite coal, from the Wyoming region in Pennsylvania, to Perth Amboy, in New Jersey, than it demanded or received from another shipper for "a like and contemporaneous service in the transportation" of anthracite coal between the same points, in violation of section 2 of the Act to Regulate Commerce; and further charges that from August 1, 1901, to July 17, 1907, the



defendant company demanded and received from plaintiff's firm unjust and unreasonable rates for the transportation of anthracite coal from the Wyoming region in Pennsylvania to Perth Amboy New Jersey, in violation of said act.

In support of this charge, it is alleged in the petition, as follows: That defendant is a common carrier engaged in interstate railroad transportation between points in the states of Pennsylvania, New Jersey and New York, and is largely engaged in transporting anthracite coal for plaintiff and other shippers over its lines,

238 from collieries in the Wyoming coal region of Pennsylvania. to Perth Amboy, in the state of New Jersey; that one of said shippers other than plaintiff is the Lehigh Valley Coal Company, a corporation of the state of Pennsylvania, engaged in the business of mining and buying anthracite coal in said Wyoming region.

Plaintiff alleges that from November 1, 1900, to August 1, 1901, the defendant company, intending to unjustly and unreasonably discriminate in favor of, and to prefer, the Lehigh Valley Coal Company to the plaintiff and other independent shippers, unlawfully charged the plaintiff with excessive and discriminatory rates on 55,257.75 tons of anthracite coal of prepared sizes, 16,689 tons of pea coal, 11,448.93 tons of buckwheat coal, and 4,926.77 tons of rice coal, shipped between the said Wyoming coal region and Perth Amboy, New Jersey, the total charges on such coal amounting to \$129,989.18, whereas, had the plaintiff been given the benefit of the rates charged by defendant for similar shipments of the said Lehigh Valley Coal Company, the total charge upon plaintiff's said shipments would have been \$11,909.33 less than the sum exacted as above during the period aforesaid, which sum, with interest thereon from August 1, 1901, was awarded by the Interstate Commerce Commission in favor of the plaintiff, in their supplemental report dated May 7, 1912, as also in their orders supplemental thereto, issued June 8 and 15, 1912, attached to said petition and marked Exhibits "A" and "B." respectively.

Plaintiff further alleges that from August 1, 1901, to July 1, 1907, the defendant charged and exacted from petitioner, over its said line of road from the Wyoming coal region, aforesaid, to Perth Amboy, at tide water in New Jersey, the following unreasonable and excessive charges upon all shipments of anthracite coal, to wit:

239 \$1.55 per ton for prepared coal, \$1.40 per ton for pea coal, \$1.25 per ton for buckwheat coal, and \$1.10 per ton for coal smaller than buckwheat coal. That from August 1, 1901, to July 1, 1907, these shipments amounted to 246,870.15 tons of prepared sizes of such coal, 106,051.09 tons of the pea size of such coal, 87,250 tons of the buckwheat size of such coal, and that the charges paid thereon amounted to \$685,375.27, at rates exceeding \$1.40 per gross ton in prepared sizes, \$1.30 on pea coal, and \$1.15 on buckwheat coal, the rates fixed by the Interstate Commerce Commission as proper and reasonable, the amount of such excess being \$58,236.45, paid by plaintiff to the defendant. That said payments were made under protest that the same were unreasonable and excessive.

The petition then recites that on July 17, 1907, plaintiff filed with the Interstate Commerce Commission a complaint, setting forth the aforesaid unreasonable and discriminatory practices and charges of defendant, to the prejudice of the plaintiff and in violation of the Act to Regulate Commerce, and praying for a hearing upon the allegations set forth in said complaint, and that the commission make an order, requiring the defendant to cease and desist from the practices aforesaid, and fixing the proper and reasonable rate for transportation of anthracite coal over defendant's line, from the Wyoming region to tidewater at Perth Amboy, and awarding complainants reparation in damages in such amount as they might have suffered loss by reason of said improper practices and charges. Defendant, being duly served with a copy of said complaint, made answer thereto, issue was joined, and the complaint regularly heard and argued by all the parties thereto, and submitted. A report was duly filed by the said commission on June 8, 1911, in Docket No. 1180, a copy of which report, with the conclusions and orders of the commission, is attached to plaintiff's petition as "Exhibit C."

240 By this report the Interstate Commerce Commission held that the charges by the defendant company to the plaintiff, between November 1, 1900, and August 1, 1901, were discriminatory, and therefore unlawful, and also that the charges of defendant company, between August 1, 1901, and July 1, 1907, were unreasonable, and the same were ordered to be discontinued, and that reasonable and proper charges for the transportation of anthracite coal over defendant's line between the points of origin and destination aforesaid, should thereafter be \$1.40 per gross ton on prepared sizes, instead of \$1.55, the rate charged, and \$1.30 on pea coal, instead of \$1.40, the rate charged, and \$1.15 on buckwheat coal, instead of \$1.20, the rate charged, and the commission held "that reparation should be awarded upon the basis of the rates herein found to be reasonable, upon all shipments of coal by complainants from the Wyoming region to Perth Amboy, since August 1, 1901. The amount of reparation which should be awarded under our finding in this case cannot be ascertained from the exhibits now on file, and such further proceeding will be had as may be necessary to determine the amount of money due to complainants."

Plaintiff's petition further recites that a hearing was had upon the question of reparation, and that a supplemental report was filed by said commission May 7, 1912. In this report, attached to the petition and marked "Exhibit A," the commission state "that the original report in No. 1180 disposed of all the questions at issue, except the claim for reparation, and the case was held open for the purpose of securing further information regarding that feature. A further hearing has been held, and complainant has presented exhibits, showing the total number of tons of each variety of coal shipped and the amount of reparation due on such shipments. These exhibits have been examined by defendant and admitted to be correct."

241 They then refer to their finding in the original report, that the

rates exacted by defendant from November 1, 1900, to August 1, 1901, were unjustly discriminatory and in violation of section 2 of the act, to the extent that they exceeded the rates contemporaneously charged the Lehigh Valley Coal Company under the contract then in effect between that company and the defendant, and to the further finding in said original report, that the rates in effect from August 1, 1901, to July 17, 1907, were unreasonable, to the extent that they exceeded rates of \$1.40 per gross ton on prepared sizes \$1.30 on pea, and \$1.15 on buckwheat.

They then proceed to say that on the basis of their conclusions in the former report, and upon consideration of the evidence adduced at the hearing upon the question of reparation, they now find that during the period from November 1, 1900, to August 1, 1901, in regard to the charges exacted from plaintiff and found to have been unjustly discriminatory, that complainant was entitled to an award of reparation in the sum of \$11,009.33, with interest thereon from August 1, 1901. And they further find, in regard to the rates exacted for coal shipped by plaintiff from August 1, 1901, to July 7, 1907, which were found unreasonable in the original report, that plaintiff is "entitled to an additional award of reparation in the sum of \$58,236.45 with interest amounting to \$27750.64, on the individual charges comprising said sum from the dates of payment thereof to September 1, 1911, together with interest on said sum of \$58,236.45, from September 1, 1911."

Following said supplemental report, and on the same day, to wit May 7, 1912, a so-called supplemental order was entered, which, as amended in an unimportant particular May 15, 1912, read as follows:

242 "This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

"It is ordered, That defendant Lehigh Valley Railroad Company be, and it is hereby authorized and required to pay unto complainant Henry E. Meeker, surviving partner of Henry E. Meeker and Caroline H. Meeker, co-partners, trading as Meeker & Company on or before the 15th day of July, 1912, the sum of \$11,009.33 with interest thereon at the rate of 6 per cent. per annum from the 1st day of August, 1901, as reparation for unjustly discriminatory rates charged for the transportation of anthracite coal from the Wyoming coal region, in Pennsylvania, to Perth Amboy, New Jersey, which rates so charged have been found by this commission to have been unjustly discriminatory, as more fully and at large appears in and by said report of the commission.

"It is further ordered, That defendant Lehigh Valley Railroad Company be, and it is hereby authorized and required to pay unto complainant, Henry E. Meeker, surviving partner of Henry E. Meeker and Caroline H. Meeker, co-partners, trading as Meeker

Company, on or before the 15th day of July, 1912, the sum of \$58,236.45, with interest thereon at the rate of 6 per cent. per annum, amounting to \$27,750.64, upon the various individual charges comprising said sum, from the dates of payment thereof to September 1, 1911, as itemized in complainant's Exhibit 2, together with interest at the rate of 6 per cent. per annum on said sum of \$58,236.45 from September 1, 1911, as reparation for unreasonable rates charged for the transportation of various shipments of anthracite coal from the Wyoming coal region in Pennsylvania, 243 to Perth Amboy, New Jersey, which rates so charged have been found by this commission to have been unreasonable, as more fully and at large appears in and by said report of the commission."

The petition then avers that a true copy of this order of the commission was duly served upon the defendant, and demand made for payment of the sum claimed in the petition, and as set forth in the aforesaid orders of the commission and attached to the petition as Exhibits "A" and "B," but the defendant had failed and refused to pay the said sums, or any part thereof. "Wherefore," it is alleged, "petitioner has instituted this proceeding to enforce the aforesaid order, regularly and lawfully made under the Act to Regulate Commerce." (The theory of the petition thus appears to be that this is a proceeding to enforce the order of reparation made by the commission, and not a suit for the recovery of such damages as plaintiff has actually incurred by reason of the alleged unlawful acts of defendant, as found by the commission.) The court is then prayed to enter a rule upon said defendant to file a plea, answer, or demurrer to the petition within thirty days from the date of serving a copy of the same, and to fix a time and place for the trial of the cause under the provisions of the Act to Regulate Commerce.

The defendant accordingly filed, October 5, 1912, its plea of the general issue, the bar of the statutes of limitation applicable to plaintiff's claim, and for a further plea averred that the Interstate Commerce Commission had no jurisdiction to make the findings and order of reparation which the plaintiff seeks to enforce, and that there was before the commission no substantial evidence to sustain its findings and order.

At the trial, the plaintiff put in evidence the report of the commission, dated June 8, 1911 (see Record, pp. 22-73), and the 244 order thereon of the same date, requiring the defendant to abstain from charging or receiving its present rates for the transportation of coal so found to be unreasonable, and requiring defendant for a period of two years thereafter to maintain the rates found in said report to be reasonable. Also, the supplemental report of the commission, dated May 7, 1912, finding the reparation or damages to which the plaintiff was entitled, and the supplemental order of that date, amended by that of June 15, as hereinbefore set out, requiring the defendant to pay to plaintiff, on or before the first day of August, 1912, the sums found due as and for reparation in said supplemental report.

Save the testimony of the plaintiff (Meeker), bearing upon the

charge of discrimination as to freight rates between November 1, 1900, and August 1, 1901, no evidence, other than these four papers was offered by plaintiff at the trial. The defendant offered no testimony, except that of Mr. George W. Field, one of its counsel, who attended the hearing before the Interstate Commerce Commission and made certain calculations from Exhibits "A" and "B," offered in evidence by defendant, dividing up the shipments therein set out between different dates, to which the different statutes of limitation might apply. Plaintiff's contention was and is, that these four papers, in the absence of any evidence on the part of the defendant, made out a prima facie case in his favor and entitled him to a recovery, as damages, of the amounts awarded by the commission.

This was the view taken by the learned judge of the court below, in submitting the case to the jury, and a verdict was accordingly rendered in favor of the plaintiff for the aggregate sums awarded by the commission, as reparation, which, with interest thereon, amounted to \$109,280.17. To the judgment thereon, this  
245 writ of error is sued out by the defendant. Certain of the assignments challenge the constitutionality of section 16 of the Act to Regulate Commerce, on the ground that its provision, that the findings and order of the commission shall be prima facie evidence of the facts therein stated, is unconstitutional, in that it confers judicial power upon an administrative commission, deprives the defendant of its property without due process of law, and denies to it its right of trial by jury; and also, on the ground that the provision of said section, conferring upon the commission authority to determine and award damages to any party complaining of the violation of the act by a common carrier and to direct such carrier to pay to the complainant before a day named the sum so awarded, and declaring that, on a trial of a suit to recover such damages, the facts stated in the findings and order of the commission shall be prima facie evidence of the facts therein stated, is not a proper exercise of the powers given to Congress to regulate commerce. The latter point was raised before this court in the case of *Western New York & P. R. Co. vs. Penn Refining Co.*, 70 C. C. A. 23. We there said:

"The constitutionality of the provisions making findings of fact prima facie evidence before a jury, has been challenged by sundry assignments of error, but is, we think, beyond reasonable question. The constitutional guaranty relative to trial by jury in the courts of the United States, does not exclude legislative authority to effect convenient changes in the rules of evidence, involving no detriment to litigants."

In view of this decision, counsel for the plaintiff in error does not attempt a reargument of the question before this court. The question as to the other grounds of constitutionality, is disposed of by the view taken as to what may be the proper interpretation and application of the provisions of the statute. The questions  
246 raised by the assignments of error which are most material, relate to the submission of the reports and orders of the Interstate Commerce Commission, and to how far and in what respect the

same are to be taken as prima facie evidence of facts stated by them. Also, the question whether the facts of which such reports and orders are the prima facie evidence, are sufficient, in the absence of countervailing testimony by the defendant, to maintain the plaintiff's suit and claim for damages.

This court has already, in a decision at this term, in the case of Lehigh Valley Railroad Co. et al. vs. J. Mitchell Clark, et al., discussed at some length the history of the legislation embodied in the Act to Regulate Commerce, and its amendments. As we there pointed out, section 14 of the original act made it the duty of the commission to make a report in writing, which should include the findings of fact upon which the conclusions of the commission are based, together with its recommendation as to what reparation should be made to the parties found to have been injured, "and such findings so made shall thereafter, in all judicial proceedings, be deemed prima facie evidence as to each and every fact found."

Section 16 provided for the refusal or neglect "to obey any lawful order or requirement of the commission, by authorizing the commission and the party interested in such order or requirement, to apply in a summary way to a Circuit Court of the United States, sitting in equity, and empower such court, as a court of equity, to hear and determine the matter, etc. And on such hearing, the report of said commission shall be prima facie evidence of the matters therein stated. And it was provided that if it be made to appear to the court "that the lawful order or requirement of said commission,

drawn in question, has been violated or disobeyed," the court  
247 may issue "a writ of injunction, or other proper process, mandatory or otherwise, to restrain the common carrier from further violation or disobedience of such order."

From the fact that it was to a court of equity alone that resort was to be had for the enforcement of an order of the commission, it was apparent that it was only to such ministerial orders of the commission as could be enforced by a court of equity, that the act in this respect could apply, and that a recommendation or an award of damages by the commission was not such an order or requirement as could be thus enforced without a violation of the seventh amendment to the Constitution, in regard to jury trials. This consideration suggested the Act of March 2, 1889, amending section 16 of the original act by adding thereto the following:

"If the matters involved in such order or requirement of said commission are founded upon a controversy requiring a trial by jury, as provided by the seventh amendment of the Constitution of the United States, and any such common carrier shall violate or refuse, or neglect to obey or perform the same, after notice, etc., \* \* \* it shall be lawful for any company or person interested \* \* \* to apply in a summary way, by petition, to the Circuit Court of the United States, sitting as a court of law, \* \* \* alleging such violation or disobedience as the case may be."

Then, after providing for a jury trial, the amendment concludes: "At the trial, the findings of fact of said commission, as set forth



in its report, shall be prima facie evidence of the matters therein stated."

The distinction thus clearly made between reparation and non-reparation cases, is made still more clear in the so-called "Hepburn" Act of 1906, in which section 14 was amended so as to read, as follows:

248 "That whenever an investigation shall be made by said commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the commission, together with its decision, order, or requirement in the premises; and in case damages are awarded, such report shall include the findings of fact on which the award is made."

This distinction was still further emphasized by so amending section 16 as to provide that, where, after hearing on a complaint, the commission should determine that complainant is entitled to an award of damages, it

"shall make an order, directing the carrier to pay to the complainant the sum to which he is entitled, on or before the day named. If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant \* \* \* may file in the Circuit Court of the United States for the district in which he resides, \* \* \* a petition, setting forth, briefly, the causes for which he claims damages, and the order of the commission in the premises. Such suit shall proceed in all respects like other civil suits for damages, except that, on the trial of such suit, the findings and order of the commission shall be prima facie evidence of the facts therein stated."

After other provisions, the section, as amended, further provides (the italics being ours):

"If any carrier fails or neglects to obey any order of the commission, *other than for the payment of money*, and while the same is in effect, any party injured thereby, or the commission in its own name, may apply to the circuit court in the district where such carrier has its principal operating office, \* \* \* for an enforcement of such order. Such application shall be by petition, which shall

249 state the substance of the order and the respect in which the carrier has failed of obedience, and shall be served upon the carrier in such manner as the court may direct, and the court shall prosecute such inquiries and make such investigations, through such means as it shall deem needful in the ascertainment of the facts at issue, or which may arise upon the hearing of such petition. If, upon such hearing as the court may determine to be necessary, it appears that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction, or other proper process, mandatory or otherwise."

Thus, the inherent and obvious distinction between reparation and non-reparation cases is clearly recognized by Congress. It could hardly be otherwise than that such recognition should be made. The great purposes of the act are largely accomplished by the ad-



ministrative control given to the Commerce Commission over all carriers, as to Interstate Commerce, and that administrative control is made efficient by the peculiar jurisdiction of a court of equity, to which the commission or a party interested may apply for the enforcement of its orders. In such cases, the whole record of the investigation by the commission is before the court, and the only matter to be determined is that the order made by the commission is a lawful order; that is, made within the scope of the authority conferred by Congress, and upon a full hearing of the parties, with the opportunity accorded of adducing testimony and having it considered. (*I. C. C. et al. vs. Louisville & Nashville R. R. Co.*, lately decided by the Supreme Court of the United States and not yet reported.)

When we come, however, to a reparation case, we encounter at once, not the question of making efficient the orders of the commission as an administrative body, and of enforcing its  
 250 proper control over Interstate Commerce, but the right of an individual plaintiff to recover compensation from the defendant for damages alleged to have been actually incurred by reason of such defendant's unlawful conduct. We are dealing not with governmental control over those engaged in a quasi public employment, but with a personal controversy, which, under our traditional institutions and constitutional system, can only be determined, as other personal controversies of the kind are determined, by a jury trial at common law.

The right to a jury trial having thus been preserved by the provisions of the act above referred to, under them "the parties are entitled," as said by us in *Western New York & P. R. R. Co. vs. Penn Refining Co.* (*supra*) "to an impartial trial by jury, so conducted as to accord to them in full measure the enjoyment of their constitutional right. The procedure contemplated by the act and, unless waived, required by the Constitution, is jury trial, accompanied with the usual safeguards, furnished by a proper application of the principles of evidence and the proper submission of the case to the jury." This right of trial by jury is not granted, as of grace, by the act, but is a constitutional right of which the defendant cannot be deprived. The consistency and harmony of the reparation proceedings as authorized by the act, with the administrative features thereof, are, however, as pointed out by the Supreme Court in *Texas & Pac. Ry. Co. vs. Abilene Cotton Oil Co.*, 204 U. S. 426, maintained, by Congress having made, in the exercise of its legislative power as to the law of evidence, the "findings and order of the commission *prima facie* evidence of the facts therein stated." In all other respects, a suit under the act shall proceed "like all other civil suits for damages." We cannot give less than full meaning and effect to  
 this language. What may be the facts, or classes of facts, to  
 251 which this provision of the act applies, must be the important question in this, as in other cases, for the determination of the court. As under the decision in the *Abilene* case, the literal language of the act, in allowing a complainant as to all matters, to bring an independent common law action for damages, cannot be

reconciled with the general scope of the act, or with other particular provisions thereof, a suit for damages must in all cases calling for an exercise of the discretion of the administrative and rate-regulating body, be founded upon a previous application to and investigation by the Commerce Commission, and instituted with reference to "rights recognized in or to duties imposed by the act." We think, therefore, it clearly follows from the premises:

(1) That the finding of the commission as to the reasonableness, or otherwise, of the rate charged by the carrier in Interstate Commerce, is an administrative function properly and constitutionally delegated by the legislative power to the commission, and is, if lawfully made, conclusive upon a court of equity, in which it is sought to enforce an order founded upon the same. In the language of Mr. Justice Lamar, in *I. C. C. vs. Union Pac. R. R. Co.*, 222 U. S. 541, "there was, then, under the statute nothing for the companies to do, except to comply with the order." The lawfulness of such finding is subject to judicial inquiry only in the respects above referred to.

(2) Assuming, but not deciding, that such finding is not only an administrative conclusion by the commission, which can be enforced as such by a court of equity, but also a finding of fact having evidential value in a suit for damages, it is only *prima facie* evidence of such fact, and not conclusive, as it would be in a suit in equity to enforce the fixing of a reasonable rate.

252 (3) The finding by the commission that a given rate is unreasonable, while pertinent to the issue, is not necessarily decisive of the question of liability in such a case as the present, either *prima facie* or otherwise. No argument is needed to show that the liability of the defendant, in damages, cannot be established by the mere finding or award of the commission in regard to the same. If it could be, of course all distinction between reparation and non-reparation cases, so carefully made in the statute, would be nugatory, and the value of the common law trial, secured by the seventh amendment, be destroyed.

The pertinency and evidential weight and value of the facts, as to which the findings and order are *prima facie* evidence, are for the determination of the court and jury, as in other civil causes. They may or may not make out a *prima facie* case for the plaintiff. The importance of the exceptional privilege thus conferred upon the plaintiff, of not being required to prove, in the first instance, the facts found by the commission, makes it the more necessary that the court should point out to the jury what are and what are not such findings. The imperative command of section 14, that in case damages are awarded, such report shall include the findings of fact on which the award is made, evidently contemplated a distinct enumeration of such findings by the commission, with reference to their proposed use in a jury trial, and evidently with this understanding, the original rule of the commission was made, that "upon the final submission of the case to the commission, either party may submit proposed findings of fact for the consideration of the commission,

which findings must embrace only the material facts of the case supposed to be established by the testimony."

No function of a trial judge in such a case could be more exigent than that of pointing out to a jury, in a case where no separate and distinct findings of fact had been made in the report of the commission, what were properly to be considered such findings. We can only reiterate what was said by us in the Penn Refining Company case (*supra*):

"While not expressing the opinion that findings of fact, even when mixed with incompetent matter, should in all cases be excluded, we hold that, if the same be received, the court should clearly separate and distinguish before the jury the findings of fact from the incompetent matter, and direct that the latter be disregarded. Unless this course be pursued, the parties are deprived, at least in part, of the benefits and safeguards intended to be secured to them under the constitutional guaranty of a trial by jury."

It will be remembered that the only evidence adduced by the plaintiff in support of his claim for damages at the trial, consisted of the four documents to which we have above referred, viz:

(1) The original report of the commission, dated June 8, 1911, occupies fifty printed pages of the record. In this report, the commission find that the complainants have sustained the allegation of unjust discrimination under the second section of the act, and that reparation, with interest from August 1, 1901, will be awarded on this account. At the close of their report, they find, as follows:

"After careful study of defendant's exhibits relating to tonnage and cost of movement, as well as painstaking analysis of defendant's voluminous exhibits, respecting its past and present financial condition, we are of opinion and so find that defendant's rates for the transportation of coal from the Wyoming region to Perth Amboy \* \* \* are unreasonable so far as they exceed"

a certain amount. (This finding, as defendant contends, is not a finding that the rates in effect from August 1, 1901, to July 17, 1907, were unreasonable, but that the then present rates, as they existed at the date of the report, were unreasonable.) The opinion is then expressed that reparation should be awarded upon the basis of the rates found in said report to be reasonable.

(2) This report is followed by an order of the same date, commanding the defendant "to desist, on or before the 15th day of August, 1911, and for a period of two years thereafter, from charging or demanding its present rates, and that defendant be required to establish, on or before said date, and maintain for a period of two years thereafter, rates not in excess" of the rates therein specified.

(3) A supplemental report, made by the commission, May 7, 1912, which states that the original report disposed of all the questions at issue, except the claim for reparation, and that the case was held open for further information regarding that feature. It then states that a further hearing had been held and complainant had presented exhibits showing the total number of tons of each variety of coal shipped and the amount of reparation due on the amount of such shipments. They then say that in their original report they

had found that the rates charged complainant for transportation of coal during the period from November 1, 1900, to August 1, 1901, were unjustly discriminatory to an extent named, and that the rates in effect from August 1, 1901, to July 17, 1907, were unreasonable, so far as they exceeded rates established as reasonable by the commission. This latter reference to the original report is, as claimed by the defendant, inaccurate. They then say that, on the basis of their conclusions in the former report, and upon consideration of the evidence adduced at the hearing upon the question of reparation (which is nowhere set out), they find, first, the number of tons of the various sizes of coal shipped by complainant over defendant's road from November 1, 1900, to August 1, 1901, and the amount of the charges thereon, and that complainant has been damaged to the extent of the difference between the amount which he did pay and the amount he would have paid had he had the benefit of the rates applied by defendant to similar shipments of the Lehigh Valley Coal Company. Second, they find the number of tons shipped by plaintiff over defendant's road, from August 1, 1901, to July 7, 1907, and the charges paid thereon, "at the rates found to have been unreasonable;" and that complainant has been damaged to the extent of the difference between the amount which he did pay and the amount he would have paid at the rates found reasonable.

(4) By the supplemental order issued on the same day, to wit, May 7, 1912, and amended June 15, 1912, which we have heretofore quoted in extenso, the defendant is required to pay, as reparation, to the plaintiff the amount found to have been unjustly discriminatory, and also the amount charged by said defendant over and above the amounts found to be reasonable by the commission.

As to these documents thus admitted in evidence, it is apparent that the requirement of section 14, that "in case damages are awarded, such report shall include the findings of fact on which the award is made," has not been complied with by any express findings of fact in the supplemental report of May 7, 1912, in which the award of damages against the defendant is made; that such findings of fact, if any, must be looked for in the voluminous pages of the original report filed June 8, 1911, to which reference is made in the supplemental report; and that in the said original report, there are no findings of fact, as such, and they must be gathered, if gathered at all, from a mass of recited evidence, statements, opinions, and conclusions of the commission, all of which were irrelevant to an award of actual pecuniary damage.

The assignments of error are numerous, but, for the purposes of this case, we may confine our attention to those which are founded upon the admission by the court, over the objection of the defendant, of these four papers, as evidence before the jury, without discrimination on the part of the court as to the evidential value of the opinions, statements, arguments and conclusions contained therein; to those upon the failure of the court to clearly separate and distinguish, for the benefit of the jury, the findings of fact from the incompetent matter contained in such reports, and to direct that the latter be

wholly disregarded; and to those founded upon the portions of the charge of the court, in which the jury are in effect told that the award of damages made by the commission against the defendant, in the orders of reparation pursuant to its report, was, in the absence of controlling testimony on the part of the defendant, binding upon the jury.

The reparation report of May 7, 1912, contains no findings of fact, but merely refers to the original report of June 8, 1911, "as disposing of all the questions at issue, except the claim for reparation," and is silent as to the information and evidence that may have been adduced before it relevant to that claim. The jury would therefore be compelled to examine that voluminous report to discover for themselves whether it contained any findings of fact bearing upon the question as to what actual damage had been suffered by the plaintiff, by reason of the unlawful conduct of the defendant. Various matters may have entered into the determination of the question, whether actual damage had been suffered by the plaintiff.

257 It is quite conceivable that, though, in the performance of its administrative function, the commission finds a certain rate to be discriminatory or unreasonable and orders such rate to be changed in that regard, no actual pecuniary damage has resulted therefrom to the particular complainant before it. As said by Mr. Commissioner Clements in a public address:

"It often happens, in the attempt at reparation for wrongs accomplished, that the party most injuriously affected has no standing in law to claim reparation, for the reason that he was not the shipper and had no dealing with the carrier—he may have been the producer, consumer, or the dealer, and yet the price at which he sold or bought may have been so affected that ultimately he had to bear the burden of the increased rate, although it was paid directly, in the first instance, by the shipper."

The injustice must be apparent, of permitting an individual shipper, after procuring, upon his complaint, a reduction of rate for the future, in the interest of the public generally, to secure for himself, by way of reparation, the difference between the new and the old rate, which has already been charged to and paid by the consumer.

The contention of the plaintiff, sanctioned by the court below, carried to its logical conclusion, is, that the finding of an unreasonable rate and the award by the commission of damages in the precise sum representing the difference between such rate and that declared to be reasonable, constitutes a *prima facie* case against the defendant, so that the suit brought by the plaintiff is, in effect, a suit to recover a penalty in which the whole burden of proof rests upon the defendant. We are not prepared to agree that this is a suit to recover a specific penalty prescribed by law, but is a suit, as described by the

258 statute, to recover damages, in which the causes for which plaintiff claims damages must be set forth, and to be proceeded in like other civil suits for damages.

The learned counsel for the plaintiff has not pointed out in his brief, nor claimed in his oral argument that there are any findings of fact upon which the award of damages was made by the com-

mission, except its conclusion as to the existence of a discriminatory charge between 1900 and 1901, and of an unreasonable charge between 1901 and 1907, and those findings of fact and circumstances tending to establish the same. A careful reading of the fifty pages of this report does not disclose any specific findings of fact bearing on the award of reparation, other than the undisputed tonnage shipped by complainant. The report is occupied entirely with a discussion of the evidence adduced before it, on the charges of discrimination and of unreasonableness.

Granting, however, that these papers, including this long report in which the findings of fact alone are to be looked for, were admissible, as has been already indicated, it was clearly the duty of the court below to point out such portions of the voluminous record as alone should be considered findings of fact, within the meaning of section 16 of the act. We think in this respect the court has failed to assist the jury in the proper conduct of the case, to the detriment of the defendant. It can hardly be denied that such instructions were not only due from the court to the jury, but that without them, these papers, including this voluminous report of the commission, which in itself constituted a fair sized book, should not have been admitted. The record discloses the fact that, when this report of June 8, 1911, was offered in evidence, it was objected to by the defendant, on the ground that it contained no findings of fact, as required by the statute, or which are material or relevant in a reparation suit. Counsel for plaintiff said in reply:

259 "There are certain findings of the commission in this case, if that point is made, which perhaps your Honor will have to guard in telling the jury what part of this report to consider, and I will prepare and submit to your Honor such a point for charge, striking out such points as are argumentative or historical, and confining the jury's consideration to such findings of fact as the commission may make."

Upon further objection by counsel for defendant, on the ground that

"The report contained many statements purporting to be statements of evidence in the hearing before the Interstate Commerce Commission, arguments, opinions, and conclusions, which the statute does not purport to make admissible as *prima facie* evidence,"

counsel for plaintiff said in reply:

"I would suggest—and this is only a suggestion—that your Honor say that you will control the effect of this report by a proper charge to the jury, because there are certain statements of evidence, statements of an historical character, which I think under the cases, the court should control in submitting the case to the jury, and direct their attention to the facts found in the report."

The COURT: "Then your idea is simply to offer the report in evidence, for the purpose of proving that there was an order made, and all relevant material in support of that evidence?"

COUNSEL FOR PLAINTIFF: "Yes, sir."



The COURT: "The court will, of course, indicate to the jury what of the report is relevant."

260 After this very significant colloquy, the report was admitted in evidence, and afterwards, at the close of the testimony, the record states that counsel for the defendant "read to the jury what he stated to be material portions of said exhibits." It is not stated, however, in the record, what portions were so read; and we look in vain for any directions by the court to the jury in regard to this important matter.

The following extracts from the charge indicate the theory upon which the court below submitted the case to the jury, and the attitude of the court towards these reports and orders of the commission:

"It is objected here, gentlemen of the jury, that these reports made by the commission, upon which this suit is based, are not in accordance with the requirements of this act and, therefore, you should find for the defendant. But I instruct you, gentlemen of the jury, that they are, in the judgment of the court, in accordance with the requirements of this section. They state the conclusions as required by the act, and they state the findings of fact upon which the award is based, and they make that award in the sums that I have mentioned, upon sufficient findings of fact to sustain this suit."

\* \* \* \* \*

"In the presentation of this claim to the court and the jury, the Act of Congress *gives the report* a certain character as evidence. Congress, while it authorizes the Interstate Commerce Commission to investigate these alleged grievances and to ascertain whether a shipper has been injured and in what amount, and to award what, in their judgment, is a proper amount, yet requires that, if it is not paid by the defendant, the defendant shall have its day in court, before a jury, for the purpose of ascertaining whether or not it is liable, as found by the Interstate Commerce Commission, in accordance with the forms of procedur directed by the Constitution.

261 But in that proceeding, the suit is *on the report* of the finding of the Interstate Commerce Commission, and their finding if made *prima facie* evidence of the correctness of *the amount the plaintiff is entitled to recover*, and, in a suit on an award of the Interstate Commerce Commission, the plaintiff, when it comes into court, must show that there was such a complaint made before the Interstate Commerce Commission, must show what the Interstate Commerce Commission did by way of its conclusion and award, and that it has not been paid, *and that makes its prima facie* case of its right to claim." (The italics are ours.)

There is no attempt here, or elsewhere in the charge, to separate from the mass of statements in the report what might be considered findings of fact, or to instruct the jury that the statute, in making such findings *prima facie* evidence of the facts stated, leaves the evidential value of such facts to the jury. On the contrary, as will be seen in the above extracts from the charge, the court gave the jury to understand that the report and findings of the commission as to unreasonableness, and the award of damages made thereon, were *prima facie* evidence of the plaintiff's case and of the liability



of the defendant, and conclusive upon the defendant, unless he could rebut the same. In this, we think the court was clearly in error. The statute, in conformity with the constitutional requirement, has provided that the defendant can only be mulcted in damages by the verdict of a jury rendered in a suit, as at common law, proceeded in "in all respects like other civil suits for damages." The statute says that such facts as are stated in the findings or order of the commission need not be proved in the suit for damages, but that such findings or order shall be prima facie evidence of the same, for whatever they may be worth. In other words, the statute makes the finding or order prima facie evidence of certain  
262 facts, but it does not make, or attempt to make, such facts prima facie evidence of anything.

Since the hearing and determination of this case, as also of Lehigh Valley Railroad Co. vs. J. Mitchell Clark, et al., the Supreme Court has promulgated an opinion and decision in Pennsylvania Railroad Co. vs. International Coal Mining Company. This decision bears directly upon some of the fundamental questions involved in the case now under consideration, as it did in those involved in the Clark case, above referred to. On the vital point, whether in this suit, "like other civil suits for damage," actual damage must be proved, we again quote the language of Mr. Justice Lamar:

"There were many provisions of the statute for imprisonment and fines. On the civil side, the act provided for compensation—not punishment. Though the act had been held to be in many respects highly penal, yet there was no fixed measure of damage in favor of the plaintiff. But, as said in *Parsons vs. Railway*, 167 U. S. 460, construing this section (8), 'before any party can recover under the act, he must show, not merely the wrong of the carrier, but that that wrong has in fact operated to his injury.' Congress had not then and has not since given any indication of an intent that persons not injured might, nevertheless, recover what, though called damages, would really be a penalty, in addition to the penalty payable to the Government."

After referring to quite a number of cases relied upon by plaintiff, Mr. Justice Lamar says they "do not support the proposition, that damages can be recovered without proof of what pecuniary loss had been suffered as a result of the discrimination."

It hardly needs to be pointed out, as we did in the Clark case, that the ratio decidendi of the Supreme Court does not differ from that applicable to the present case. The Supreme Court also  
263 distinctly decides that, in the absence of proof of actual damage to that extent, the amount of the rebate charged and proved to have been made by defendant, cannot be recovered as damages, and that it can never be made the measure of the damage to which plaintiff is entitled. Nor more in this case can the difference between what is found by the commission to be the unreasonable tariff rate and that fixed as a reasonable one, be made the measure of the damage that the plaintiff has suffered. As pecuniary

damages are neither alleged in the pleadings nor proved in the trial, the plaintiff made out no case upon which recovery of damages could be had.

For the reasons above stated, we think the judgment below should be reversed, with directions for a venire de novo.

There was a second complaint made to the Interstate Commerce Commission by defendant (Meeker), in his own name, dated April 13, 1910, pending the proceeding in his first complaint filed July 17, 1907. In the former complaint, as we have seen, the commission were dealing with the question of the unreasonableness of the rates on anthracite coal from the Wyoming region to Perth Amboy, between August 1, 1901, and July 17, 1907, whereas the second complaint dealt with the same charges or rates between July 17, 1907, the date of the filing of the first complaint, and April 13, 1910. The supplemental report of the commission, dated May 7, 1912, was a blanket report and covered both complaints. As to the later case, the report, after dealing with the former, said:

"With the exception of the reparation features, the issues involved in No. 3235 have been passed upon by the commission in No. 1180. The latter case covered the period from November 1st,

1900, to July 17th, 1907, while the instant case is designed  
264 to secure reparation upon shipments which moved between July 17th, 1907, and April 13th, 1910. The petition in the present case, therefore, resolves itself into a prayer for reparation on shipments moving subsequent to the period covered by the original report, on basis of the conclusions announced in that report. \* \* \*

The former case was filed with the commission within one year from the passage of the law of June 29th, 1906, and consequently was not limited to causes of action that accrued within two years prior to the filing of the complaint. The present proceeding, however, was instituted more than one year subsequent to the passage of that law, and is therefore subject to the two year limitation of the statute. Complainant's prayer for reparation on shipments moving more than two years prior to the filing of the complaint in this case, must be denied.

"On basis of our decision in No. 1180, upon consideration of the evidence submitted at the hearing of the present case regarding the amount of reparation due complainant,"

the commission find that the rates exacted by defendant during the two years prior to the filing of his last complaint, were unreasonable to the same extent as found in the report as to the former period from August 1, 1901, to July 17, 1907. The report in this latter case does not purport to include the statements and findings of the original report, or of the supplemental report in regard to the former case. It merely makes a finding of unreasonableness on the basis of their decision in No. 1180. How far it is competent for the commission to proceed upon findings and evidence in a former and distinct case, by merely referring to the same, need not now be decided. The suits in the court below, as to both cases, were tried and submitted to the jury together, upon the same instructions as to

the prima facie character of the report and the award.  
265 Therefore, what has been heretofore said in regard to the former case, is applicable to the latter, and need not be repeated.

The judgment, therefore, in the second case must also be reversed, with directions for a venire de novo.

The second paragraph of section 16 of the act concludes as follows:

"All complaints for the recovery of damages shall be filed with the commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit court, or state court, within one year from the date of the order, and not after; Provided, that claims accrued prior to the passage of this act may be presented within one year."

The manifest intention of Congress here, as in all statutes of limitations, was to prevent the accumulation of claims until they were stale, and to compel those who felt themselves aggrieved by the rates exacted by interstate carriers, to use due diligence in availing themselves of the remedial provisions of the act. It surely was not the intent of the amendment passed June 29, 1906, that claims prior to that date which had accrued as far back as 1887, might be presented to the commission, provided only they were so presented within one year after the passage of the amending act of 1906. The evident purpose of Congress was to cut off all claims for reparation more than two years old. In order, however, to prevent those whose accrued claims were two years old at the time of the passage of the amending act, from being taken by surprise and put at a disadvantage, as compared with those whose claims had accrued less than two years before the passage of the act, or with

those whose claims having accrued after the passage  
266 of the act had full notice of the time within which they must be prosecuted, Congress gave a year's time within which claims accruing before the passage of the act might be presented to the commission. It would be a harsh construction, however, doing violence to what seems to us the evident intent of Congress, to say that, in giving this time, it did not mean to preserve the two years' limitation, both as to claims before and after the act. We conclude, therefore, that the commission in this case had no jurisdiction to entertain a claim of the shipper accruing prior to July 17, 1905.

(Received and filed August 27, 1913. Saunders Lewis, Jr., Clerk.)

267 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1913.

No. 1721 (List No. 29).

LEHIGH VALLEY RAILROAD Co., Plaintiff in Error,

vs.

MEEKER & COMPANY, Defendant in Error.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby reversed with costs, with directions for a venire de novo.

(Signed)

GEORGE GRAY,

*Circuit Judge.*

Philadelphia, August 29, 1913.

Endorsed: No. 1721. Order Reversing Judgment Received & Filed Aug. 29, 1913. Saunders Lewis, Jr., Clerk.

268 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1913.

No. 1721.

LEHIGH VALLEY RAILROAD Co., Plaintiff in Error,

vs.

MEEKER & COMPANY, Defendant in Error.

And afterwards, to wit, on the twenty-third day of September, 1913, a petition for rehearing was filed, on behalf of Defendant in Error, upon consideration whereof the Court made the following order:

269 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1913.

Nos. 1720 and 1721.

LEHIGH VALLEY RAILROAD Co., Plaintiff in Error,

vs.

HENRY E. MEEKER, Defendant in Error.

LEHIGH VALLEY RAILROAD Co., Plaintiff in Error,

vs.

MEEKER & COMPANY, Defendant in Error.

Upon consideration of the petition for re-hearing filed in the above-entitled causes, it is now hereby ordered that the same be granted and that the cases be added to the present October Term List for re-argument.

(Signed)

GEORGE GRAY,  
*Circuit Judge.*

Philadelphia, October 15, 1913.

Endorsed: Nos. 1720 and 1721. Order Granting Re-hearing and directing cases placed on list for re-argument. Received & Filed Oct. 15, 1913. Saunders Lewis, Jr., Clerk.

270 In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1913.

No. 1721.

LEHIGH VALLEY RAILROAD Co., Plaintiff in Error,

vs.

HENRY E. MEEKER, Defendant in Error.

And afterwards, to wit, on the third day of December, 1913, come the parties aforesaid by their counsel aforesaid, and this case being called for re-argument sur pleadings and briefs, before the Hon. George Gray, Hon. Joseph Buffington, and Hon. John B. McPherson, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof;

And afterwards, to wit, on the nineteenth day of February, 1914, come the parties aforesaid by their counsel aforesaid, and the Court now being fully advised in the premises, renders the following decision:

- 271 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1913.

No. 1721.

LEHIGH VALLEY RAILROAD COMPANY, Plaintiff in Error,  
vs.

HENRY E. MEEKER, Surviving Partner of the Firm of Henry E. Meeker and Caroline H. Meeker, Doing Business Under the Trade Name of Meeker & Company, Defendant in Error.

March Term, 1913.

No. 1720.

LEHIGH VALLEY RAILROAD COMPANY, Plaintiff in Error,  
vs.

HENRY E. MEEKER, Defendant in Error.

*Opinion of the Court by Gray, Circuit Judge.*

- 272 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1913.

No. 1721.

LEHIGH VALLEY RAILROAD COMPANY, Plaintiff in Error,  
vs.

HENRY E. MEEKER, Surviving Partner of the Firm of Henry E. Meeker and Caroline H. Meeker, Doing Business Under the Trade Name of Meeker & Company, Defendant in Error.

March Term, 1913.

No. 1720.

LEHIGH VALLEY RAILROAD COMPANY, Plaintiff in Error,  
vs.

HENRY E. MEEKER, Defendant in Error.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

Before Gray, Buffington and McPherson, Circuit Judges.

GRAY, *Circuit Judge*:

On September 3, 1912, Henry E. Meeker, surviving partner of the firm of Meeker & Company, defendant in error (hereinafter called the plaintiff), instituted in the court below, under the pro-

visions of section 16 of the Act to Regulate Commerce, a suit  
273 against the Lehigh Valley Railroad Company, plaintiff in error (hereinafter called the defendant), to recover damages alleged to have been incurred by reason of certain acts and practices of the defendant, in violation of said act, and therefore the subject of complaint by the said plaintiff before the Interstate Commerce Commission.

To the judgment obtained by the plaintiff against the defendant, this writ of error has been sued out by the latter.

In his petition in the court below, "setting forth briefly the causes for which he claims damages," plaintiff charges that the defendant company, as a common carrier, subject to the provisions of the Interstate Commerce Act, from November 1, 1900, to August 1, 1901, discriminated against his firm, in that it demanded and received from Meeker & Company greater compensation for services rendered in the transportation of anthracite coal, from the Wyoming region in Pennsylvania, to Perth Amboy, in New Jersey, than it demanded or received from another shipper for "a like and contemporaneous service in the transportation" of anthracite coal between the same points, in violation of section 2 of the Act to Regulate Commerce; and further charges that from August 1, 1901, to July 17, 1907, the defendant company demanded and received from plaintiff's firm unjust and unreasonable rates for the transportation of anthracite coal from the Wyoming region in Pennsylvania to Perth Amboy, New Jersey, in violation of said act.

In support of this charge, it is alleged in the petition, as follows: That defendant is a common carrier engaged in interstate railroad transportation between points in the states of Pennsylvania, New Jersey and New York, and is largely engaged in transporting anthracite coal for plaintiff and other shippers over its lines.  
274 from collieries in the Wyoming coal region of Pennsylvania, to Perth Amboy, in the state of New Jersey; that one of said shippers other than plaintiff is the Lehigh Valley Coal Company, a corporation of the state of Pennsylvania, engaged in the business of mining and buying anthracite coal in said Wyoming region.

Plaintiff alleges that from November 1, 1900, to August 1, 1901, the defendant company, intending to unjustly and unreasonably discriminate in favor of, and to prefer, the Lehigh Valley Coal Company to the plaintiff and other independent shippers, unlawfully charged the plaintiff with excessive and discriminatory rates on 55,257.75 tons of anthracite coal of prepared sizes, 16,689 tons of pea coal, 11,448.93 tons of buckwheat coal, and 4,926.77 tons of rice coal, shipped between the said Wyoming coal region and Perth Amboy, New Jersey, the total charges on such coal amounting to \$129,989.18, whereas, had the plaintiff been given the benefit of the rates charged by defendant for similar shipments of the said Lehigh Valley Coal Company, the total charge upon plaintiff's said shipments would have been \$11,909.33 less than the sum exacted as above during the period aforesaid, which sum, with interest thereon from August 1, 1901, was awarded by the Interstate Commerce Commission in favor of the plaintiff, in their supplemental report dated May



7, 1912, as also in their orders supplemental thereto, issued June 8 and 15, 1912, attached to said petition and marked Exhibits "A," and "B," respectively.

Plaintiff further alleges that from August 1, 1901, to July 1, 1907, the defendant charged and exacted from petitioner, over its said line of road from the Wyoming coal region, aforesaid, to Perth Amboy, at tide water in New Jersey, the following unreasonable and excessive charges upon all shipments of anthracite coal, to  
275 wit: \$1.55 per ton for prepared coal, \$1.40 per ton for pea coal, \$1.25 per ton for buckwheat coal, and \$1.10 per ton for coal smaller than buckwheat coal. That from August 1, 1901, to July 1, 1907, these shipments amounted to 246,870.15 tons of prepared sizes of such coal, 106,051.09 tons of the pea size of such coal, 87,250 tons of the buckwheat size of such coal, and that the charges paid thereon amounted to \$685,375.27, at rates exceeding \$1.40 per gross ton in prepared sizes, \$1.30 on pea coal, and \$1.15 on buckwheat coal, the rates fixed by the Interstate Commerce Commission as proper and reasonable, the amount of such excess being \$58,236.45, paid by plaintiff to the defendant. That said payments were made under protest that the same were unreasonable and excessive.

The petition then recites that on July 17, 1907, plaintiff filed with the Interstate Commerce Commission a complaint, setting forth the aforesaid unreasonable and discriminatory practices and charges of defendant, to the prejudice of the plaintiff and in violation of the Act to Regulate Commerce, and praying for a hearing upon the allegations set forth in said complaint, and that the commission make an order, requiring the defendant to cease and desist from the practices aforesaid, and fixing the proper and reasonable rate for transportation of anthracite coal over defendant's line, from the Wyoming region to tidewater at Perth Amboy, and awarding complainants reparation in damages in such amount as they might have suffered loss by reason of said improper practices and charges. Defendant, being duly served with a copy of said complaint, made answer thereto, issue was joined, and the complaint regularly heard and argued by all the parties thereto, and submitted. A report was duly filed by the said commission on June 8, 1911, in Docket No. 1180, a copy of which report, with the conclusions and orders of the commission, is attached to plaintiff's petition as "Exhibit

C."

276 By this report the Interstate Commerce Commission held that the charges by the defendant company to the plaintiff, between November 1, 1900, and August 1, 1901, were discriminatory, and therefore unlawful, and also that the charges of defendant company, between August 1, 1901, and July 1, 1907, were unreasonable, and the same were ordered to be discontinued, and that reasonable and proper charges for the transportation of anthracite coal over defendant's line between the points of origin and destination aforesaid, should thereafter be \$1.40 per gross ton on prepared sizes, instead of \$1.55, the rate charged, and \$1.30 on pea coal, instead of \$1.40, the rate charged, and \$1.15 on buckwheat coal, instead of \$1.20, the rate charged, and the commission held "that reparation

should be awarded upon the basis of the rates herein found to be reasonable, upon all shipments of coal by complainants from the Wyoming region to Perth Amboy, since August 1, 1901. The amount of reparation which should be awarded under our finding in this case cannot be ascertained from the exhibits now on file, and such further proceeding will be had as may be necessary to determine the amount of money due to complainants."

Plaintiff's petition further recites that a hearing was had upon the question of reparation, and that a supplemental report was filed by said commission May 7, 1912. In this report, attached to the petition and marked "Exhibit A," the commission state "that the original report in No. 1180 disposed of all the questions at issue, except the claim for reparation, and the case was held open for the purpose of securing further information regarding that feature. A further hearing has been held and complainant has presented exhibits, showing the total number of tons of each variety of coal shipped and the amount of reparation due on such shipments.

277 These exhibits have been examined by defendant and admitted to be correct."

They then refer to their finding in the original report, that the rates exacted by defendant from November 1, 1900, to August 1, 1901, were unjustly discriminatory and in violation of section 2 of the act, to the extent that they exceeded the rates contemporaneously charged the Lehigh Valley Coal Company under the contract then in effect between that company and the defendant, and to the further finding in said original report, that the rates in effect from August 1, 1901, to July 17, 1907, were unreasonable, to the extent that they exceeded rates of \$1.40 per gross ton on prepared sizes, \$1.30 on pea, and \$1.15 on buckwheat.

They then proceed to say that on the basis of their conclusions in the former report, and upon consideration of the evidence adduced at the hearing upon the question of reparation, they now find that, during the period from November 1, 1900, to August 1, 1901, in regard to the charges exacted from plaintiff and found to have been unjustly discriminatory, that complainant was entitled to an award of reparation in the sum of \$11,009.33, with interest thereon from August 1, 1901. And they further find, in regard to the rates exacted for coal shipped by plaintiff from August 1, 1901, to July 7, 1907, which were found unreasonable in the original report, that plaintiff is "entitled to an additional award of reparation in the sum of \$58,236.45, with interest, amounting to \$27,750.64, on the individual charges comprising said sum, from the dates of payment thereof to September 1, 1911, together with interest on said sum of \$58,236.45, from September 1, 1911."

Following said supplemental report, and on the same day, to wit, May 7, 1912, a so-called supplemental order was entered, which, as amended in an unimportant particular May 15, 1912, read as follows:

278 "This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having

been had, and the commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

"It is ordered, That defendant Lehigh Valley Railroad Company be, and it is hereby authorized and required to pay unto complainant, Henry E. Meeker, surviving partner of Henry E. Meeker and Caroline H. Meeker, co-partners, trading as Meeker & Company, on or before the fifteenth day of July, 1912, the sum of \$11,009.33, with interest thereon at the rate of six per cent. per annum from the first day of August, 1901, as reparation for unjustly discriminatory rates charged for the transportation of anthracite coal from the Wyoming coal region, in Pennsylvania, to Perth Amboy, New Jersey, which rates so charged have been found by this commission to have been unjustly discriminatory, as more fully and at large appears in and by said report of the commission.

"It is further ordered, That defendant Lehigh Valley Railroad Company be, and it is hereby authorized and required to pay unto complainant, Henry E. Meeker, surviving partner of Henry E. Meeker and Caroline H. Meeker, co-partners, trading as Meeker & Company, on or before the fifteenth day of July, 1912, the sum of \$58,236.45, with interest thereon at the rate of six per cent. per annum, amounting to \$27,750.64, upon the various individual charges comprising said sum, from the dates of payment thereof to September 1, 1911, as itemized in complainant's Exhibit 2, together with interest at the rate of six per cent. per annum on said sum of \$58,236.45 from September 1, 1911, as reparation for unreasonable rates charged for the transportation of various shipments of anthracite coal from the Wyoming coal region in Pennsylvania, to Perth Amboy, New Jersey, which rates so charged have been found by this commission to have been unreasonable, as more fully and at large appears in and by said report of the commission."

The petition then avers that a true copy of this order of the commission was duly served upon the defendant, and demand made for payment of the sum claimed in the petition, and as set forth in the aforesaid orders of the commission and attached to the petition as Exhibits "A" and "B," but the defendant had failed and refused to pay the said sums, or any part thereof. "Wherefore," it is alleged, "petitioner has instituted this proceeding to enforce the aforesaid order, regularly and lawfully made under the Act to Regulate Commerce." (The theory of the petition thus appears to be that this is a proceeding to enforce the order of reparation made by the commission, and not a suit for the recovery of such damages as plaintiff has actually incurred by reason of the alleged unlawful acts of defendant, as found by the commission.) The court is then prayed to enter a rule upon said defendant to file a plea, answer, or demurrer to the petition within thirty days from the date of serving a copy of the same, and to fix a time and place for the trial of the cause under the provisions of the Act to Regulate Commerce.

The defendant accordingly filed, October 5, 1912, its plea of the

general issue, the bar of the statutes of limitation applicable to plaintiff's claim, and for a further plea averred that the Interstate Commerce Commission had no jurisdiction to make the findings and order of reparation which the plaintiff seeks to enforce, and that there was before the commission no substantial evidence to sustain its findings and order.

280 At the trial, the plaintiff put in evidence the report of the commission, dated June 8, 1911 (see Record, pp. 22-73), and the order thereon of the same date, requiring the defendant to abstain from charging or receiving its present rates for the transportation of coal so found to be unreasonable, and requiring defendant for a period of two years thereafter to maintain the rates found in said report to be reasonable. Also, the supplemental report of the commission, dated May 7, 1912, finding the reparation or damages to which the plaintiff was entitled, and the supplemental order of that date, amended by that of June 15, as hereinbefore set out, requiring the defendant to pay to plaintiff, on or before the first day of August, 1912, the sums found due as and for reparation in said supplemental report.

Save the testimony of the plaintiff (Meeker), bearing upon the charge of discrimination as to freight rates between November 1, 1900, and August 1, 1901, no evidence, other than these four papers, was offered by plaintiff at the trial. The defendant offered no testimony, except that of Mr. George W. Field, one of its counsel, who attended the hearing before the Interstate Commerce Commission and made certain calculations from Exhibits "A" and "B," offered in evidence by defendant, dividing up the shipments therein set out between different dates, to which the different statutes of limitation might apply. Plaintiff's contention was and is, that these four papers, in the absence of any evidence on the part of the defendant, made out a prima facie case in his favor and entitled him to a recovery, as damages, of the amounts awarded by the commission.

This was the view taken by the learned judge of the court below, in submitting the case to the jury, and a verdict was accordingly rendered in favor of the plaintiff for the aggregate sums  
281 awarded by the commission, as reparation, which, with interest thereon, amounted to \$109,280.17. To the judgment thereon, this writ of error is sued out by the defendant. Certain of the assignments challenge the constitutionality of section 16 of the Act to Regulate Commerce, on the ground that its provision, that the findings and order of the commission shall be prima facie evidence of the facts therein stated, is unconstitutional, in that it confers judicial power upon an administrative commission, deprives the defendant of its property without due process of law, and denies to it its right of trial by jury; and also, on the ground that the provision of said section, conferring upon the commission authority to determine and award damages to any party complaining of the violation of the act by a common carrier and to direct such carrier to pay to the complainant before a day named the sum so awarded, and declaring that, on a trial of a suit to recover such damages, the facts stated in the findings and order of the commission shall be

prima facie evidence of the facts therein stated, is not a proper exercise of the powers given to Congress to regulate commerce. The latter point was raised before this court in the case of *Western New York & P. R. R. Co. vs. Penn Refining Co.*, 70 C. C. A. 23. We there said:

"The constitutionality of the provisions making findings of fact prima facie evidence before a jury, has been challenged by sundry assignments of error, but is, we think, beyond reasonable question. The constitutional guaranty relative to trial by jury in the courts of the United States, does not exclude legislative authority to effect convenient changes in the rules of evidence, involving no detriment to litigants."

In view of this decision, counsel for the plaintiff in error does not attempt a reargument of the question before this court.  
282 The question as to the other grounds of constitutionality, is disposed of by the view taken as to what may be the proper interpretation and application of the provisions of the statute. The questions raised by the assignments of error which are most material, relate to the submission of the reports and orders of the Interstate Commerce Commission, and to how far and in what respect the same are to be taken as prima facie evidence of facts stated by them. Also, the question whether the facts of which such reports and orders are the prima facie evidence, are sufficient, in the absence of countervailing testimony by the defendant, to maintain the plaintiff's suit and claim for damages.

This court has already, in a decision at this term, in the case of *Lehigh Valley Railroad Co. et al. vs. J. Mitchell Clark et al.*, discussed at some length the history of the legislation embodied in the Act to Regulate Commerce, and its amendments. As we there pointed out, section 14 of the original act made it the duty of the commission to make a report in writing, which should include the findings of fact upon which the conclusions of the commission are based, together with its recommendation as to what reparation should be made to the parties found to have been injured, "and such findings so made shall thereafter, in all judicial proceedings, be deemed prima facie evidence as to each and every fact found."

Section 16 provided for the refusal or neglect "to obey any lawful order or requirement of the commission, by authorizing the commission and the party interested in such order or requirement, to apply in a summary way to a Circuit Court of the United States, sitting in equity, and empower such court, as a court of equity, to hear and determine the matter," etc. And on such hearing, the report  
283 of said commission shall be prima facie evidence of the matters therein stated. And it was provided that if it be made to appear to the court "that the lawful order or requirement of said commission, drawn in question, has been violated or disobeyed," the court may issue "a writ of injunction, or other proper process, mandatory or otherwise, to restrain the common carrier from further violation or disobedience of such order."

From the fact that it was to a court of equity alone that resort was to be had for the enforcement of an order of the commission,



it was apparent that it was only to such ministerial orders of the commission as could be enforced by a court of equity, that the act in this respect could apply, and that a recommendation or an award of damages by the commission was not such an order or requirement as could be thus enforced without a violation of the seventh amendment to the Constitution, in regard to jury trials. This consideration suggested the Act of March 2, 1889, amending section 16 of the original act by adding thereto the following:

"If the matters involved in such order or requirement of said commission are founded upon a controversy requiring a trial by jury, as provided by the seventh amendment of the Constitution of the United States, and any such common carrier shall violate or refuse, or neglect to obey or perform the same, after notice, etc., \* \* \* it shall be lawful for any company or person interested \* \* \* to apply in a summary way, by petition, to the Circuit Court of the United States, sitting as a court of law, \* \* \* alleging such violation or disobedience as the case may be."

Then, after providing for a jury trial, the amendment concludes: "At the trial, the findings of fact of said commission, as set forth in its report, shall be prima facie evidence of the matters therein stated."

284 The distinction thus clearly made between reparation and non-reparation cases, is made still more clear in the so-called "Hepburn" Act of 1906, in which section 14 was amended so as to read as follows:

"That whenever an investigation shall be made by said commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the commission, together with its decision, order, or requirement in the premises; and in case damages are awarded, such report shall include the findings of fact on which the award is made."

This distinction was still further emphasized by so amending section 16 as to provide that, where, after hearing on a complaint, the commission should determine that complainant is entitled to an award of damages, it

"shall make an order, directing the carrier to pay to the complainant the sum to which he is entitled, on or before the day named. If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant \* \* \* may file in the Circuit Court of the United States for the district in which he resides, \* \* \* a petition, setting forth, briefly, the causes for which he claims damages, and the order of the commission in the premises. Such suit shall proceed in all respects like other civil suits for damages, except that, on the trial of such suit, the findings and order of the commission shall be prima facie evidence of the facts therein stated."

After other provisions, the section, as amended, further provides (the italics being ours):

285 "If any carrier fails or neglects to obey any order of the commission, *other than for the payment of money*, and while the same is in effect, any party injured thereby, or the commission in its own name, may apply to the Circuit Court in the

district where such carrier has its principal operating office, \* \* \* for an enforcement of such order. Such application shall be by petition, which shall state the substance of the order and the respect in which the carrier has failed of obedience, and shall be served upon the carrier in such manner as the court may direct, and the court shall prosecute such inquiries and make such investigations, through such means as it shall deem needful in the ascertainment of the facts at issue, or which may arise upon the hearing of such petition. If, upon such hearing as the court may determine to be necessary, it appears that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction, or other proper process, mandatory or otherwise."

Thus, the inherent and obvious distinction between reparation and non-reparation cases is clearly recognized by Congress. It could hardly be otherwise than that such recognition should be made. The great purposes of the act are largely accomplished by the administrative control given to the Commerce Commission over all carriers, as to interstate commerce, and that administrative control is made efficient by the peculiar jurisdiction of a court of equity, to which the commission or a party interested may apply for the enforcement of its orders. In such cases, the whole record of the investigation by the commission is before the court, and the only matter to be determined is that the order made by the commission is a lawful order; that is, made within the scope of the authority conferred by Congress, and upon a full hearing of the parties, with the opportunity accorded of adducing testimony and having it considered. (I. C. C. 286 et al. vs. Louisville & Nashville R. R. Co., lately decided by the Supreme Court of the United States and not yet reported.)

When we come, however, to a reparation case, we encounter at once, not the question of making efficient the orders of the commission as an administrative body, and of enforcing its proper control over interstate commerce, but the right of an individual plaintiff to recover compensation from the defendant for damages alleged to have been actually incurred by reason of such defendant's unlawful conduct. We are dealing not with governmental control over those engaged in a quasi public employment, but with a personal controversy, which, under our traditional institutions and constitutional system, can only be determined, as other personal controversies of the kind are determined, by a jury trial at common law.

The right to a jury trial having thus been preserved by the provisions of the act above referred to, under them "the parties are entitled," as said by us in *Western New York & P. R. R. Co. vs. Penn Refining Co.* (supra), "to an impartial trial by jury, so conducted as to accord to them in full measure the enjoyment of their constitutional right. The procedure contemplated by the act and, unless waived, required by the Constitution, is jury trial, accompanied with the usual safeguards, furnished by a proper application of the principles of evidence and the proper submission of the case to the jury." This right of trial by jury is not granted, as of grace, by the act, but is a constitutional right of which the defendant cannot be



deprived. The consistency and harmony of the reparation proceedings as authorized by the act, with the administrative features thereof, are, however, as pointed out by the Supreme Court in *Texas & Pac. Ry. Co. vs. Abilene Cotton Oil Co.*, 204 U. S. 426, maintained by Congress having made, in the exercise of its legislative  
 287 power as to the law of evidence, the "findings and order of the commission prima facie evidence of the facts therein stated."

In all other respects, a suit under the act shall proceed "like all other civil suits for damages." We cannot give less than full meaning and effect to this language. What may be the facts or classes of facts, to which this provision of the act applies, must be the important question in this, as in other cases, for the determination of the court. As under the decision in the *Abilene* case, the literal language of the act, in allowing a complainant as to all matters, to bring an independent common law action for damages, cannot be reconciled with the general scope of the act, or with other particular provisions thereof, a suit for damages must in all cases calling for an exercise of the discretion of the administrative and rate-regulating body, be founded upon a previous application to and investigation by the Commerce Commission, and instituted with reference to "rights recognized in or to duties imposed by the act." We think, therefore, it clearly follows from the premises:

(1) That the finding of the commission as to the reasonableness or otherwise of the rate charged by the carrier in interstate commerce, is an administrative function properly and constitutionally delegated by the legislative power to the commission, and is, if lawfully made, conclusive. If such finding of the commission is, that a given rate charged by a carrier in interstate commerce is unreasonable, it is as if the unreasonableness of such rate were fixed by the statute. The lawfulness of such finding is subject to judicial inquiry only in the respects above referred to.

(2) The finding by the commission, that a given rate is unreasonable, while pertinent to the issue, in that it establishes a violation of the act, is not decisive of the question of liability  
 288 for damages under section 8, in such case as the present, either prima facie or otherwise.

(3) The pertinency and evidential weight and value of the facts as to which the findings and order are prima facie evidence, are for the determination of the court and jury, as in other civil causes. They may or may not make out a prima facie case for the plaintiff.

The importance of the exceptional privilege thus conferred upon the plaintiff, of not being required to prove, in the first instance, the facts found by the commission, makes it the more necessary that the court should point out to the jury what are and what are not such findings. The imperative command of section 14, that in case damages are awarded, such report shall include the findings of fact on which the award is made, evidently contemplated a distinct enumeration of such findings by the commission, with reference to their proposed use in a jury trial, and evidently with this understanding, the original rule of the commission was made, that "upon the final submission of the case to the commission, either party may submit proposed findings of fact for the consideration of the commission,

which findings must embrace only the material facts of the case supposed to be established by the testimony."

No function of a trial judge in such a case could be more exigent than that of pointing out to a jury, in a case where no separate and distinct findings of fact had been made in the report of the commission, what were properly to be considered such findings. We can only reiterate what was said by us in the Penn Refining Company case (*supra*):

289 "While not expressing the opinion that findings of fact, even when mixed with incompetent matter, should in all cases be excluded, we hold that, if the same be received, the court should clearly separate and distinguish before the jury the findings of fact from the incompetent matter, and direct that the latter be disregarded. Unless this course be pursued, the parties are deprived, at least in part, of the benefits and safeguards intended to be secured to them under the constitutional guaranty of a trial by jury."

It will be remembered that the only evidence adduced by the plaintiff in support of his claim for damages at the trial, consisted of the four documents to which we have above referred, viz:

(1) The original report of the commission, dated June 8, 1911, occupies fifty printed pages of the record. In this report the commission find that the complainants have sustained the allegation of unjust discrimination under the second section of the act, and that reparation, with interest from August 1, 1901, will be awarded on this account. At the close of their report, they find, as follows:

"After careful study of defendant's exhibits relating to tonnage and cost of movement, as well as painstaking analysis of defendant's voluminous exhibits, respecting its past and present financial condition, we are of opinion and so find that defendant's rates for the transportation of coal from the Wyoming region to Perth Amboy \* \* \* are unreasonable so far as they exceed"

a certain amount. (This finding, as defendant contends, is not a finding that the rates in effect from August 1, 1901, to July 17, 1907, were unreasonable, but that the then present rates, as they existed at the date of the report, were unreasonable.) The opinion is then expressed that reparation should be awarded upon the basis of the rates found in said report to be reasonable.

290 (2) This report is followed by an order of the same date, commanding the defendant "to desist, on or before the fifteenth day of August, 1911, and for a period of two years thereafter, from charging or demanding its present rates, and that defendant be required to establish, on or before said date, and maintain for a period of two years thereafter, rates not in excess" of the rates therein specified.

(3) A supplemental report, made by the commission, May 7, 1912, which states that the original report disposed of all the questions at issue, except the claim for reparation, and that the case was held open for further information regarding that feature. It then states that a further hearing had been held and complainant had presented exhibits showing the total number of tons of each variety of coal shipped and the amount of reparation due on the

amount of such shipments. They then say that in their original report they had found that the rates charged complainant for transportation of coal during the period from November 1, 1900, to August 1, 1901, were unjustly discriminatory to an extent named, and that the rates in effect from August 1, 1901, to July 17, 1907, were unreasonable, so far as they exceeded rates established as reasonable by the commission. This latter reference to the original report is, as claimed by the defendant, inaccurate. They then say that, on the basis of their conclusions in the former report, and upon consideration of the evidence adduced at the hearing upon the question of reparation (which is nowhere set out), they find, first, the number of tons of the various sizes of coal shipped by complainant over defendant's road from November 1, 1900, to August 1, 1901, and the amount of the charges thereon, and that complainant has been damaged to the extent of the difference between the 291 amount which he did pay and the amount he would have paid had he had the benefit of the rates applied by defendant to similar shipments of the Lehigh Valley Coal Company. Second, they find the number of tons shipped by plaintiff over defendant's road, from August 1, 1901, to July 7, 1907, and the charges paid thereon, "at the rates found to have been unreasonable"; and that complainant has been damaged to the extent of the difference between the amount which he did pay and the amount he would have paid at the rates found reasonable.

(4) By the supplemental order issued on the same day, to wit, May 7, 1912, and amended June 15, 1912, which we have heretofore quoted in extenso, the defendant is required to pay, as reparation, to the plaintiff the amount found to have been unjustly discriminatory, and also the amount charged by said defendant over and above the amounts found to be reasonable by the commission.

As to these documents thus admitted in evidence, it is apparent that the requirement of section 14, that "in case damages are awarded, such report shall include the findings of fact on which the award is made," has not been complied with by any express findings of fact in the supplemental report of May 7, 1912, in which the award of damages against the defendant is made; that such findings of fact, if any, must be looked for in the voluminous pages of the original report filed June 8, 1911, to which reference is made in the supplemental report; and that in the said original report, there are no findings of fact, as such, and they must be gathered, if gathered at all, from a mass of recited evidence, statements, opinions, and conclusions of the commission, all of which were irrelevant to an award of actual pecuniary damage.

The assignments of error are numerous, but for the purposes of this case, we may confine our attention to those 292 which are founded upon the admission by the court, over the objection of the defendant, of these four papers, as evidence before the jury, without discrimination on the part of the court as to the evidential value of the opinions, statements, arguments and conclusions contained therein; to those upon the failure of the court to clearly separate and distinguish, for the benefit of the jury,

the findings of fact from the incompetent matter contained in such reports, and to direct that the latter be wholly disregarded; and to those founded upon the portions of the charge of the court, in which the jury are in effect told that the award of damages made by the commission against the defendant, in the orders of reparation pursuant to its report, was, in the absence of controlling testimony on the part of the defendant, binding upon the jury.

The reparation report of May 7, 1912, contains no findings of fact, but merely refers to the original report of June 8, 1911, "as disposing of all the questions at issue, except the claim for reparation," and is silent as to the information and evidence that may have been adduced before it relevant to that claim. The jury would therefore be compelled to examine that voluminous report to discover for themselves whether it contained any findings of fact bearing upon the question as to what actual damage had been suffered by the plaintiff, by reason of the unlawful conduct of the defendant. Various matters may have entered into the determination of the question, whether actual damage had been suffered by the plaintiff. It is quite conceivable that, though, in the performance of its administrative function, the commission finds a certain rate to be discriminatory or unreasonable and orders such rate to be changed in that regard, no actual pecuniary damage has resulted therefrom to the particular complainant before it. As said by Mr. Commissioner Clements in a public address:

293 "It often happens, in the attempt at reparation for wrongs accomplished, that the party most injuriously affected has no standing in law to claim reparation, for the reason that he was not the shipper and had no dealing with the carrier—he may have been the producer, consumer, or the dealer, and yet the price at which he sold or bought may have been so affected that ultimately he had to bear the burden of the increased rate, although it was paid directly, in the first instance, by the shipper."

The injustice must be apparent, of permitting an individual shipper, after procuring, upon his complaint, a reduction of rate for the future, in the interest of the public generally, to secure for himself, by way of reparation, the difference between the new and the old rate, which has already been charged to and paid by the consumer.

The contention of the plaintiff, sanctioned by the court below, carried to its logical conclusion, is, that the finding of an unreasonable rate and the award by the commission of damages in the precise sum representing the difference between such rate and that declared to be reasonable, constitutes a *prima facie* case against the defendant, so that the suit brought by the plaintiff is, in effect, a suit to recover a penalty in which the whole burden of proof rests upon the defendant. We are not prepared to agree that this is a suit to recover a specific penalty prescribed by law, but is a suit, as described by the statute, to recover damages, in which the causes for which plaintiff claims damages must be set forth, and to be proceeded in like other civil suits for damages.

The learned counsel for the plaintiff has not pointed out in his

brief, nor claimed in his oral argument that there are any findings of fact upon which the award of damages was made by the commission, except its conclusion as to the existence of a discriminatory charge between 1900 and 1901, and of an unreasonable charge between 1901 and 1907, and those findings of fact and circumstances tending to establish the same. A careful reading of the fifty pages of this report does not disclose any specific finding of fact bearing on the award of reparation, other than the undisputed tonnage shipped by complainant. The report is occupied entirely with a discussion of the evidence adduced before it, on the charges of discrimination and of unreasonableness.

Granting, however, that these papers, including this long report in which the findings of fact alone are to be looked for, were admissible, as has been already indicated, it was clearly the duty of the court below to point out such portions of the voluminous record as alone should be considered findings of fact, within the meaning of section 16 of the act. We think in this respect the court has failed to assist the jury in the proper conduct of the case, to the detriment of the defendant. It can hardly be denied that such instructions were not only due from the court to the jury, but that without them, these papers, including this voluminous report of the commission, which in itself constituted a fair sized book, should not have been admitted. The record discloses the fact that, when this report of June 8, 1911, was offered in evidence, it was objected to by the defendant, on the ground that it contained no findings of fact, as required by the statute, or which are material or relevant in a reparation suit. Counsel for plaintiff said in reply:

"There are certain findings of the commission in this case, if that point is made, which perhaps your Honor will have to guard in telling the jury what part of this report to consider, and I will prepare and submit to your Honor such a point for charge, striking out such points as are argumentative or historical, and confining the jury's consideration to such findings of fact as the commission may make."

295 Upon further objection by counsel for defendant, on the ground that

"The report contained many statements purporting to be statements of evidence in the hearing before the Interstate Commerce Commission, arguments, opinions, and conclusions, which the statute does not purport to make admissible as prima facie evidence,"

counsel for plaintiff said in reply:

"I would suggest—and this is only a suggestion—that your Honor say that you will control the effect of this report by a proper charge to the jury, because there are certain statements of evidence, statements of an historical character, which I think under the cases, the court should control in submitting the case to the jury and direct their attention to the facts found in the report."

The Court: "Then your idea is simply to offer the report in evidence, for the purpose of proving that there was an order made, and all relevant material in support of that evidence?"

COUNSEL FOR PLAINTIFF: "Yes, sir."

The COURT: "The court will, of course, indicate to the jury what of the report is relevant."

After this very significant colloquy, the report was admitted in evidence, and afterwards, at the close of the testimony, the record states that counsel for the defendant "read to the jury what he stated to be material portions of said exhibits." It is not stated, however, in the record, what portions were so read; and we look in vain for any directions by the court to the jury in regard to this important matter.

296 The following extracts from the charge indicate the theory upon which the court below submitted the case to the jury, and the attitude of the court towards these reports and orders of the commission:

"It is objected here, gentlemen of the jury, that these reports made by the commission, upon which this suit is based, are not in accordance with the requirements of this act and, therefore, you should find for the defendant. But I instruct you, gentlemen of the jury, that they are, in the judgment of the court, in accordance with the requirements of this section. They state the conclusions as required by the act, and they state the findings of fact upon which the award is based, and they make that award in the sums that I have mentioned, upon sufficient findings of fact to sustain this suit."

\* \* \* \* \*

"In the presentation of this claim to the court and the jury, the Act of Congress *gives the report* a certain character as evidence. Congress, while it authorizes the Interstate Commerce Commission to investigate these alleged grievances and to ascertain whether a shipper has been injured and in what amount, and to award what, in their judgment, is a proper amount, yet requires that, if it is not paid by the defendant, the defendant shall have its day in court before a jury, for the purpose of ascertaining whether or not it is liable, as found by the Interstate Commerce Commission, in accordance with the forms of procedure directed by the Constitution. But in that proceeding, the suit is *on the report* of the finding of the Interstate Commerce Commission, and their finding is made *prima facie* evidence of the correctness of the amount the plaintiff is entitled to recover, and, in a suit on an award of the Interstate Commerce Commission, the plaintiff, when it comes into court, must show that there was such a complaint made before the Interstate Commerce Commission, must show what the Interstate Commerce Commission did by way of its conclusion and award, and that it has not been paid, *and that makes its prima facie* case of its right to claim." (The italics are ours.)

297 There is no attempt here, or elsewhere in the charge, to separate from the mass of statements in the report what might be considered findings of fact, or to instruct the jury that the statute, in making such findings *prima facie* evidence of the facts stated, leaves the evidential value of such facts to the jury. On the contrary, as will be seen in the above extracts from the charge, the court gave



the jury to understand that the report and findings of the commission as to discrimination and unreasonableness, and the award of damages made thereon, were *prima facie* evidence of the plaintiff's case and of the liability of the defendant, and conclusive upon the defendant, unless he could rebut the same. In this, we think the court was clearly in error. The statute, in conformity with the constitutional requirement, has provided that the defendant can only be mulcted in damages by the verdict of a jury rendered in a suit, as at common law, proceeded in "in all respects like other civil suits for damages." The statute says that such facts as are stated in the findings or order of the commission need not be proved in the suit for damages, but that such findings or order shall be *prima facie* evidence of the same, for whatever they may be worth. In other words, the statute makes the finding or order *prima facie* evidence of certain facts, but it does not make, or attempt to make, such facts *prima facie* evidence of anything.

Since the hearing and determination of this case, as also of *Lehigh Valley Railroad Co. vs. J. Mitchell Clark, et al.*, the Supreme Court has promulgated an opinion and decision in *Pennsylvania Railroad Co. vs. International Coal Mining Company*. This decision  
298 bears directly upon some of the fundamental questions involved in the case now under consideration, as it did in those involved in the Clark case, above referred to. On the vital point, whether in this suit, "like other civil suits for damage," actual damage must be proved, we again quote the language of Mr. Justice Lamar:

"There were many provisions of the statute for imprisonment and fines. On the civil side, the act provided for compensation—not punishment. Though the act had been held to be in many respects highly penal, yet there was no fixed measure of damage in favor of the plaintiff. But, as said in *Parsons vs. Railway*, 167 U. S. 460, construing this section (8), 'before any party can recover under the act, he must show, not merely the wrong of the carrier, but that that wrong has in fact operated to his injury.' Congress had not then and has not since given any indication of an intent that persons not injured might, nevertheless, recover what, though called damages, would really be a penalty, in addition to the penalty payable to the Government."

After referring to quite a number of cases relied upon by plaintiff, Mr. Justice Lamar says they "do not support the proposition, that damages can be recovered without proof of what pecuniary loss had been suffered as a result of the discrimination."

It hardly needs to be pointed out, as we did in the Clark case, that the ratio decidendi of the Supreme Court does not differ from that applicable to the present case. The Supreme Court also distinctly decides that, in the absence of proof of actual damage to that extent, the amount of the rebate charged and proved to have been made by defendant, cannot be recovered as damages, and that it can never be made the measure of the damage to which plaintiff is entitled. Nor more in this case can the difference between what is found by



the commission to be the unreasonable tariff rate and that  
299 fixed as a reasonable one, be made the measure of the damage  
that the plaintiff has suffered. As pecuniary damages are  
neither alleged in the pleadings nor proved in the trial, the plaintiff  
made out no case upon which recovery of damages could be had.

For the reasons above stated, we think the judgment below should  
be reversed, with directions for a venire de novo.

There was a second complaint made to the Interstate Commerce  
Commission by defendant (Meeker), in his own name, dated April  
13, 1910, pending the proceeding in his first complaint filed July 17,  
1907. In the former complaint, as we have seen, the commission  
were dealing with the question of the unreasonableness of the rates  
on anthracite coal from the Wyoming region to Perth Amboy, be-  
tween August 1, 1901, and July 17, 1907, whereas the second com-  
plaint dealt with the same charges or rates between July 17, 1907,  
the date of the filing of the first complaint, and April 13, 1910. The  
supplemental report of the commission, dated May 7, 1912, was a  
blanket report and covered both complaints. As to the later case,  
the report, after dealing with the former, said:

"With the exception of the reparation features, the issues involved  
in No. 3235 have been passed upon by the commission in No. 1180.  
The latter case covered the period from November 1, 1900, to July  
17, 1907, while the instant case is designed to secure reparation upon  
shipments which move between July 17, 1907, and April 13, 1910.  
The petition in the present case, therefore, resolves itself into a  
prayer for reparation on shipments moving subsequent to the period  
covered by the original report, on basis of the conclusions  
300 announced in that report. \* \* \* The former case was  
filed with the commission within one year from the passage  
of the law of June 29, 1906, and consequently was not limited to  
causes of action that accrued within two years prior to the filing of  
the complaint. The present proceeding, however, was instituted  
more than one year subsequent to the passage of that law, and is  
therefore subject to the two-year limitation of the statute. Com-  
plainant's prayer for reparation on shipments moving more than  
two years prior to the filing of the complaint in this case, must be  
denied.

"On basis of our decision in No. 1180, upon consideration of the  
evidence submitted at the hearing of the present case regarding the  
amount of reparation due complainant,"

the commission find that the rates exacted by defendant during the  
two years prior to the filing of his last complaint, were unreasonable  
to the same extent as found in the report as to the former period  
from August 1, 1901, to July 17, 1907. The report in this latter  
case does not purport to include the statements and findings of the  
original report, or of the supplemental report in regard to the former  
case. It merely makes a finding of unreasonableness on the basis of  
their decision in No. 1180. How far it is competent for the com-  
mission to proceed upon findings and evidence in a former and dis-  
tinct case, by merely referring to the same, need not now be decided.

The suits in the court below, as to both cases, were tried and submitted to the jury together, upon the same instructions as to the *prima facie* character of the report and the award. Therefore, what has been heretofore said in regard to the former case, is applicable to the latter, and need not be repeated.

The judgment, therefore, in the second case must also be reversed, with directions for a *venire de novo*.

301 The second paragraph of section 16 of the act concludes as follows:

"All complaints for the recovery of damages shall be filed with the commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit court, or state court, within one year from the date of the order, and not after; Provided, that claims accrued prior to the passage of this act may be presented within one year."

The manifest intention of Congress here, as in all statutes of limitations, was to prevent the accumulation of claims until they were stale, and to compel those who felt themselves aggrieved by the rates exacted by interstate carriers, to use due diligence in availing themselves of the remedial provisions of the act. It surely was not the intent of the amendment passed June 29, 1906, that claims prior to that date which had accrued as far back as 1887, might be presented to the commission, provided only they were so presented within one year after the passage of the amending act of 1906. The evident purpose of Congress was to cut off all claims for reparation more than two years old. In order, however, to prevent those whose accrued claims were two years old at the time of the passage of the amending act, from being taken by surprise and put at a disadvantage, as compared with those whose claims had accrued less than two years before the passage of the act, or with those whose claims having accrued after the passage of the act had full notice of the time within which they must be prosecuted, Congress gave a year's time within which claims accruing before the passage of the act might be presented to the commission. It would be a harsh construction, however, doing violence to what seems to us the evident intent of

302 Congress, to say that, in giving this time, it did not mean to preserve the two years' limitation, both as to claims before and after the act. We conclude, therefore, that the commission in this case had no jurisdiction to entertain a claim of the shipper accruing prior to July 17, 1905.

303 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1913.

No. 1720.

LEHIGH VALLEY RAILROAD COMPANY, Plaintiff in Error,

vs.

HENRY E. MEEKER, Defendant in Error.

March Term, 1913.

No. 1721.

LEHIGH VALLEY RAILROAD COMPANY, Plaintiff in Error,

vs.

HENRY E. MEEKER, Surviving Partner of the Firm of Henry E. Meeker and Caroline H. Meeker. Doing Business under the Trade Name of Meeker & Company, Defendant in Error.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

On Rehearing.

Before Gray, Buffington, and McPherson, Circuit Judges.

GRAY, *Circuit Judge*:

The able and interesting argument at the rehearing in this case has challenged the careful reconsideration by the court of the grounds upon which were based the conclusions announced in their original opinion.

304 We had already, at the same term, discussed very fully the Interstate Commerce Act of 1887, with the amendments of 1889 and 1906, relevant to the questions now presented, in the case of the Lehigh Valley Railroad Company vs. J. Mitchell Clark, et al., 207 Fed. Rep. 717. We therefore considered it unnecessary to repeat that discussion and analysis of the act and its amendments in the opinion filed in the present case, though we applied the principles of that decision thereto.

With this reference to our opinion in the Clark case, we confine ourself to what seem to us the crucial questions raised by the petition for, and argument at, the rehearing.

Premising what we have before said, that the provisions of the act, granting a right of action to shippers for damages incurred in consequence of violations of the act by the interstate carrier, while important, are incidental and not primary, in the scheme of the act for the control and regulation of the actual operation of interstate commerce, in the general interests of the public, let us again consider the nature and scope of such right, as disclosed by the language and general purposes of the statute creating it.

The learned counsel for the defendants in error, in his argument at the rehearing, contended with much insistence that the act, in denouncing unreasonable rates and creating a liability to the shipper therefor, was merely declaratory of the common law, and in support of this proposition, cites the following language in the opinion of Mr. Justice White, in the *Abilene Cotton Oil* case, 204 U. S. 426, 436:

"Without going into detail, it may not be doubted that, at common law, where a carrier refused to receive goods offered for carriage except upon the payment of an unreasonable sum, the shipper had a right of action in damages. It is also beyond controversy, 305 that when a carrier accepted goods without payment of the cost of carriage, or an agreement as to the price to be paid, and made an unreasonable exaction as a condition of the delivery of the goods, an action could be maintained to recover the excess over a reasonable charge. And it may further be conceded that it is now settled that, even where on the receipt of goods by a carrier, an exorbitant charge is stated, and the same is coercively exacted either in advance or at the completion of the service, an action may be maintained to recover the overcharge."

From this it was argued that (we quote from defendant in error's supplemental brief): (1) "The measure of damage was clearly the difference between the unreasonable rate paid and the reasonable rate. (2) That all that the shipper had to establish, consequently, was the amount of the charges which he had paid, and what the reasonable charge would have been. (3) Having established these facts, the shipper was entitled, as a matter of law, to recover the difference between the two rates—that is the overcharge." These propositions constitute the gravamen of defendant in error's whole argument.

In the case quoted from, the Supreme Court was dealing with a judgment in a state court, where suit had been brought to recover damages from the defendant company by reason of the exaction of an alleged unjust and unreasonable rate, which exceeded in the aggregate, by the sum sued for, an alleged just and reasonable charge. There had been no application to, or finding by, the Interstate Commerce Commission, in regard to the unreasonableness of the rate. Mr. Justice White conceded these common law rights of action, but proceeded to show that they were repugnant to the provisions of the

Interstate Commerce Act, which was intended "to afford an 306 effective and comprehensive means for redressing wrongs resulting from violations of the act," and that a shipper cannot maintain an action at common law for excessive and unreasonable freight rates exacted on interstate shipments, where rates charged had been duly fixed by the carrier according to the act, and not found to be unreasonable by the commission. We think this whole opinion tends to emphasize the distinction between the common law rights of action referred to, and the right of action created and defined by the act. A situation where the rates paid were the rates fixed by the act, as the only legal rates that could be demanded or paid, even though those rates are declared afterward by the commission, in the performance of its administrative function, to be unreason-

able, differs essentially from a situation where an illegal rate is, in the first instance, coerced or extorted by the carrier. The tariff rate paid by the shipper was the legal rate, any departure from which is made by the statute a misdemeanor and punishable by fine. There is consequently no "overcharge" to be recovered as such, as in the cases cited at common law, and no coercion except that of the law. It is obvious that, even though the statute were silent as to the measure of damage applicable to the first situation, that measure could not justly be the same as in the second. That section 22 does not help the argument of the defendant in error in this respect, is shown by Mr. Justice White, when he further says:

"It is insisted that, however cogent may be the views previously stated, they should not control, because of the following provision contained in section 22 of the Act to Regulate Commerce, viz., 'Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.' This clause, however, cannot in reason be construed as continuing in shippers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act."

We repeat that this decision of the Supreme Court so far from sustaining the contention of the defendant in error, that the Interstate Commerce Act was merely declaratory of the common law, and that the common law measure of damage was applicable to the liability created by section 8 of the act, clearly distinguishes the liability at common law, as it existed in the cases cited by Mr. Justice White, from that created by the act for every violation of its provisions. We turn to the pertinent provisions of the act.

After requiring that all charges by common carriers for transportation shall be just and reasonable, and inhibiting unjust and unreasonable charges for such service, prohibiting rebates and unreasonable preferences, and declaring the same to be unlawful, the statute, in section 8 thereof, and there alone, creates the liability with which we are here concerned. We again quote from that section:

"That in case any common carrier, subject to the provisions of this act, shall do \* \* \* any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act \* \* \* in this act required to be done, such common carrier *shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act.*" (The italics are ours.)

The learned counsel for the defendant in error seems to argue that this statute creates a general liability, independent of any relativity, limitation or qualification, as soon as a violation of the act is shown.

That this is not so, is apparent. It is not a general liability that is imposed by the act, but a particular liability to the person injured "for the full amount of damages sustained in consequence of any violation of the provisions of the act." The liability thus defined is the only civil liability anywhere imposed, and no other or different civil liability can attach itself to any violation

of the act. The liability thus imposed being the same for all violations of the law, without exception, that liability, as defined by the statute, is to the "person or persons injured for the full amount of damages sustained in consequence of any such violation of the provisions of this act." We cannot avoid the plain and exigent meaning of this language. It is impossible, in view of it, to attribute to Congress an intention to apply it to only a portion of the offenses against the act.

The logic of the situation, as recognized by the decisions of the Supreme Court in the Abilene and other recent cases, would seem to be, that a civil suit for damages may be brought under sections 8 and 9 in the District Court of the United States, for any violation of the act; that, if the violation be a simple disobedience of a specific requirement of the statute, whether of omission or commission—such, for instance, as giving a rebate—nothing more is required than to prove that specific act, and no finding of the commission is necessary to the jurisdiction of the court; but, where the illegality of the act charged depends upon whether it be reasonable or unreasonable, the option given by section 9 cannot be literally interpreted, as the determination of this issue calls for an exercise of the discretion of the administrative body. When that administrative function has been performed, and the rate complained of has been found to be unreasonable or unjust, such finding is conclusive, whether it relate

to past or present rates or practices. As said by Mr. Justice 309 Lamar, it is as if the reasonable rate or practice was established in the statute itself. It would then only be necessary to prove in court this finding of the commission, that such a specific act or practice was unreasonable, and therefore unlawful under the act, just as it was only necessary, without any finding of the commission to that effect, to show that a specific rebate has been given that was declared unlawful by the act itself. The further procedure in the case supposed, as indicated by the act, must be in all respects "like other civil suits for damages," except that the plaintiff may, in proving his pecuniary loss or damage, in consequence of a violation of the act by the defendant, use the facts stated in any finding or order of the commission in support of his claim, without further proof of such facts, supplementing the same by other evidence as, in his judgment, the exigence of the case may require.

Referring to a contention in the International Coal Company case, that a suit for damages, occasioned by rebating, could not be maintained without preliminary action by the commission, Mr. Justice Lamar, in the recent Mitchell Coal Company case, said:

"This contention was overruled, and it was held that, for doing an act prohibited by the statute, the injured party might sue the carrier without previous action by the commission, because the courts could apply the law prohibiting a departure from the tariff to the facts of the case. But where the suit is based upon unreasonable charges or unreasonable practices there is no law fixing what is unreasonable and therefore prohibited. In such cases the whole scope of the statute shows that it was intended that the commission and not the courts should pass upon that administrative question. When



such order is made it is as though the law for that particular practice had been fixed, and the courts could then apply that order, not to one case, but to every case—thereby giving every shipper equal rights and preserving uniformity of practice. Section 9 gives the plaintiff the option of going before the commission or the courts for damages occasioned by a violation of the statutes. But since the commission is charged with the duty of determining whether the practice was so unreasonable as to be a violation of the law, the plaintiff must, as a condition to his right to succeed, produce an order from the commission that the practice or the rate was thus unreasonable and therefore illegal and prohibited.”

From this illuminating view of the requisite procedure under the act, harmonizing as it does its different provisions and “giving every shipper equal rights and preserving uniformity of practice,” it would seem that all other shippers than the complainant might bring their several actions in the District Court, “for the full amount of damages sustained in consequence of” the same violation of the act, without any further finding by the commission. It having once been established what particular conduct or practice of the carrier was illegal, it would only be incumbent on a plaintiff to show the damage, if any, sustained thereby. No award of reparation, therefore, would be necessary in such cases to the jurisdiction of the court, the suits being cognizable under sections 8 and 9, as in the case of suits for damages occasioned by rebates or other specific violations of the act.

From this it seems irresistibly to follow, that all shippers prosecuting suits for damages “sustained in consequence of any violation of the provisions of the act,” are on the same footing, whether the violation be a specific act made illegal by the statute, or one in which the illegality of the act depends upon the finding of fact by the commission, that the act or practice complained of is unreasonable or unjust. In like manner it follows that the measure of damages sustained by a shipper in consequence of any violation of the act, must be the same in all cases. We find no authority in the act itself, or in the decisions of the Supreme Court, for applying a different measure of damage in the case of any violation of the act, than that established by the eighth section, viz., “the full amount of damages sustained” by reason thereof. To hold that, in one case actual damage must be proved, and in the other not, introduces a confusion in the administration of the law, for which the only justification must be the express and mandatory requirement of the statute, or the express and controlling decision of the Supreme Court. The measure of the statute is thus stated by the Supreme Court in the International Coal Mining case:

“The statute gives a right of action for damages to the injured party, and by the use of these legal terms clearly indicated that the damages recoverable were those known to the law and intended as compensation for the injury sustained. It is elementary that, in a suit at law both the fact and the amount of damage must be proved. And although the plaintiff insists that in all cases like this the fact and amount of the pecuniary loss is matter of law, yet this conten-



tion is not sustained by the language of the act, nor is it well founded in actual experience, as will appear by considering several usual and every-day instances suggested by testimony in this record."

This statement of the Supreme Court is general, and is applicable to any and all cases where damages are sought by one claiming to have been injured by a violation of the act. It would seem to dispose of the contention of the defendants in error, referred to above and approved by the court below, that "the shipper was entitled as matter of law to recover the difference between the two rates," that is, the tariff rate charged to the shipper, and the lower rate found to be reasonable by the commission. Herein is the essential  
 312 vice of defendant in error's argument, that the fact and amount of pecuniary loss in a case like the present, is matter of law, and not of fact to be determined by the jury. It does not help the matter that the defendants in error argue that the rate charged having been conclusively found by the commission as unreasonable, the award of the difference between that rate and the rate found to be reasonable is only prima facie evidence of the liability of defendant for the amount so awarded. The act makes nothing prima facie evidence of the liability created by section 8. The prima facies mentioned in section 16 is attached to the facts stated in the finding and order of the commission, which facts may or may not be sufficient to establish that liability.

Section 16 of the original act has been so amended as to meet the objection that was made soon after its enactment, that in reparation cases, the order of the commission could not be enforced by a summary proceeding in a court of equity, as administrative orders were enforced, and that the liability for the damages actually sustained by a shipper, by reason of a violation of the law, could, conformably to the seventh amendment of the Constitution, only be enforced, as are other liabilities of that kind, by a suit at common law. This recognition by Congress of the necessity of conforming to the requirements of the seventh amendment, is, of course, inconsistent with any interpretation of the ninth section, from which it could be inferred that a person claiming to be damaged by any common carrier might "elect" to pursue his claim for damages before the commission, as his final and efficient remedy, and procure an award for the payment of the same, enforceable as such in a court of law, as an administrative order is enforceable in a court of equity. The  
 313 successive amendments by which section 16 was brought into its present shape, attest the earnest purpose of Congress to meet the situation. Suits to enforce the liability created by section 8 were made available to the person injured in all cases, not only where the violation of the statute was an act or practice denounced as illegal by the law itself, but also where such act or practice was only made illegal by the finding of the commission.

Sections 13 and 15 having provided that the commission was authorized, either upon complaint or upon its own initiative, to declare, upon investigation, any rates or practices unjust or unreasonable, section 16 provided for a case where, after the complaint and investigation, an award, or, as it was called in the original act, a

recommendation, of damages was made by the commission. If not complied with by the defendant within a time specified, the complainant was authorized to file in a Circuit (District) Court of the United States, or in any state court of general jurisdiction, a petition setting forth briefly the causes for which he claims damages and the order of the commission in the premises. "Such suit in the Circuit Court of the United States shall proceed in all respects like other civil suits for damages." This is in effect authorizing in the special case described a common law suit for damages, as contemplated by sections 8 and 9, in all cases where damages are claimed consequent upon a violation of the law.

It is true, that the law makes an exception to the ordinary rule of evidence in such cases, by providing that facts stated in the findings or order of the commission need not again be proved by the plaintiff, the finding and order being made *prima facie* evidence of such facts. Such facts may or may not be relevant to the question of the liability for, or amount of, damages claimed. Their evidential value in this respect is for the court and jury trying the case. This

314 *prima facies* of the facts found is an advantage of considerable moment to the plaintiff. It is an expressed exception to the ordinary rule of evidence, and should not be extended by implication. It must be confined to the precise meaning of the language of its enactment. If the intent of the legislative mind had been to go further and make, not only the findings of fact and order *prima facie* evidence of the facts stated, but also the conclusions of the commission on facts, *prima facie* evidence of the liability of the defendant for the amount of damages stated in the award, such intent should and would have found expression in the act. We are not to impute to Congress such an intention so violative of the fundamental rights of the parties to a suit at common law, and of the express guaranty of the Constitution in that regard. If more were wanted, we might refer to the language of section 14, which emphasizes the distinction between the "conclusions" of the commission and "the findings of fact on which the award is made."

The distinction between reparation and non-reparation cases, so anxiously made by Congress, in order to conform to the spirit of the seventh amendment, would be practically nullified, if, in prosecuting a suit for damages actually sustained by reason of a violation of the law, the liability for such damages, and the amount thereof, as found by the commission, must be conceded in the first instance. Is a defendant to be called upon, practically to prove a negative, and show that the plaintiff was not damaged, or that the amount claimed was less than that stated by the commission? These facts, or the facts upon which they depend, are all peculiarly within the knowledge of the plaintiff, and it is fundamental that neither party to a suit should be required to prove or disprove what is peculiarly within the knowledge of the opposite party.

Unwarranted as this contention may be, that the findings and order of the commission are *prima facie* evidence, not only of the facts therein stated, but of the conclusions of the commission in regard to the very subject-matter in litigation, it

is also still more unjust in these cases, because if sustained, it practically and substantially makes the award of the commission, not only *prima facie*, but conclusive evidence of the plaintiff's case.

The theory of the case, as presented by the defendants in error in their pleadings, as well as at the trial, and adopted by the court below, is that the suit was brought upon the award, *qua* award, instead of having been brought "to enforce a cause of action given by this section (section 8) to any person injured." It was brought to recover what, though called damages, would really be a penalty. In accordance with this theory, plaintiff's contention logically follows that, when the commission finds that the rates charged were unreasonable, and what the reasonable charge should have been, the establishment of these facts entitles the shipper, as matter of law, to recover the difference between the two rates. In the present case we have the unquestioned finding of the commission, that the rates charged were unreasonable, and that a certain lower rate was reasonable, and the difference between the two was expressly and avowedly awarded as damages to the plaintiff. Defendants in error contend that the court below erred in awarding the difference between the two rates, and the court below states that the so-called facts, when shown at the trial, constitute a *prima facie* case for the plaintiff. If, however, the difference between the two rates is, as matter of law, the measure of damage sustained by the plaintiff, it is not only *prima facie* but conclusive evidence upon court and jury of the injury to the plaintiff and of the amount of damage to which he is entitled. Grant the premise, that plaintiff is entitled to recover, as matter of law, the difference between a reasonable and unreasonable

316 rate found by the commission, and that the suit is for recovery of that difference, as awarded by the commission, the logical conclusion is, as stated by the defendants in error and the court below. This "logical conclusion," however, is a *reductio ad absurdum*, and therefore shows the falsity of the premises upon which it is founded.

Congress admittedly, by its successive amendments to the act of 1887, sought to conform to the requirement of the seventh amendment, by providing that, where the matters involved were found upon a controversy requiring a trial by jury, such a trial should be accorded. Can it be doubted that the parties, therefore, are entitled to a real trial by jury, so conducted as to accord to them in measure the enjoyment of their constitutional right? If so, how wide of the truth is the contention that this right has been enjoyed by the defendant in the present suit?

We have already quoted one form in which the theory of the case is stated by the plaintiff below. In another place in his supplemental brief, it is thus stated:

"At common law, a shipper who had been charged unreasonable rates could recover the overcharge; and, under the statute, as so amended, as the commission had determined that there had been an overcharge, the shipper could recover in the same way, although, in the course on the trial the carrier was at liberty to disprove, if it could, the fact of the overcharge established *prima facie* by the finding in order of the commission."

The "overcharge," as has been before stated in the same brief, can be nothing else than the difference between the reasonable and the unreasonable or tariff rate. How can the carrier be said to be "at liberty" to disprove that arithmetical fact? This difference, according to the theory of the court below,—though its payment has neither been "extorted" or "coerced," except by the law—is  
 317 the damage to which the plaintiff is entitled as a matter of law. Though stated to be *prima facie*, it is really, according to that theory, conclusive as to the injury of the plaintiff and the amount of his damage.

We need only for a moment compare this theory of a suit for damages with that which is established by the act itself. The sixteenth section nowhere says that the report, findings or order of the commission are *prima facie* evidence of the liability of the defendant, or of the amount of such liability. It only says, and we must again recur to its exact language, that the findings and order of the commission "shall be *prima facie* evidence of the facts therein stated." But clearly, such facts are not made *prima facie* evidence of anything. Their evidential value is for the court and jury to determine. They may or may not be sufficient to make a *prima facie* case, or they may, in the opinion of the court or jury, be of any other greater or less degree of probative force. These facts can be no other than those referred to in the fourteenth section, where it provides that, after an investigation, the committee shall make a report, "which shall state the conclusions of the commission, together with its decision, order, or requirement in the premises; and in case damages are awarded, such report shall include the findings of fact on which the award is made."

In view of this, it would seem almost an abuse of language to say that the "facts," of which the findings and order of the commission are *prima facie* evidence, include the conclusions arrived at by the commission, as to the injury of the plaintiff and the amount of damages sustained. The measure of damage is not fixed by the statute to be the difference between a reasonable and an unreasonable rate, as a matter of law or otherwise. On the contrary, the eighth section declares that the "common carrier" in this case, as in all  
 318 others, "shall be liable to the person or persons injured for the full amount of damages sustained in consequence of any violation of the provisions of the act." What those damages may be, is a question of fact to be determined by the jury, and not a question of law. That is distinctly decided by the Supreme Court in the *International Coal Mining* case. This is the measure of damage established by the act itself, and must be conformed to in a case like the present. The language of the eighth section makes the measure of damage therein prescribed applicable to every violation of the act. Nor has the Supreme Court in any case decided otherwise. Its reasoning as to the measure of damages established by the eighth section, is also applicable to every violation of the act,—to one that depends for its illegality upon a finding of the commission, as well as to one where such finding is unnecessary. The argument to the contrary is largely technical, and tends to make a mockery of the right to a jury trial and to defeat the just purposes of the act in that respect.

We conclude by quoting again the language of the Supreme Court in the International Coal Company case, after referring to what said by that court in *Parsons vs. Railway*:

"Congress had not then and has not since, given any indication of an intent that persons not injured might nevertheless recover what, though called damages, would really be a penalty, in addition to the penalty payable to the Government."

Our opinion, therefore, already filed, with certain modifications in the text thereof, will stand as the opinion of the court in regard.

For obvious reasons, we have made no distinction between count for the recovery of damages for discriminatory rates and for unreasonable rates, and therefore have not referred to 319 former in the plaintiff's petition, complaining of discriminations alleged to have been practiced by the plaintiff in conducting the period from November, 1900, to August, 1901, although the counsel for defendants in error says in his brief at the relevant: "There is a wide distinction between the two causes of action."

But it is argued that, inasmuch as, upon application of the plaintiff, a discrimination was found by the commission to have been practiced by the defendant, and reparation therefor awarded, in amount of the difference between the tariff rate charged and the rate collected from other shippers, that award was prima facie evidence of the damage sustained by the plaintiff. So that, according to this argument, even in rebate cases there is a class, consisting of those in which the commission has intervened and made an award to which the measure of damage established by section 8 for a violation of the law, does not apply.

Defendants in error also urge that this court was in error in its interpretation of the second paragraph of section 16 of the act, providing that "All complaints for the recovery of damages shall be filed with the commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit court or state court within one year from the date of the order, and not after; Provided, that claims accrued prior to the passage of this act may be presented within one year."

We have carefully reconsidered the opinion we have already expressed as to this provision of the sixteenth section of the act, in light of the able argument of counsel for defendants in error. We are not convinced, however, that we have misconceived the meaning and spirit of that provision, and therefore adhere to our judgment, that the court below was in error in instructing 320 the jury that "there is no statute of limitation which bars the recovery of the plaintiff for either of the amounts claimed in this suit." The assignments of error in this respect, therefore, must be sustained, and for these reasons and those heretofore stated, the judgment below must be reversed, and a venire de novo awarded.

(Received and filed February 19, 1914. Saunders Lewis, Clerk.)

321 In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1913.

No. 1721 (List No. 72).

LEHIGH VALLEY RAILROAD CO., Plaintiff in Error,

vs.

HENRY E. MEEKER, Surviving Partner of the Firm of Henry E. Meeker and Caroline H. Meeker, Doing Business under the Trade Name of Meeker and Company, Defendant in Error.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby reversed, with costs, and a venire de novo awarded.

(Signed)

JOHN B. MCPHERSON,

*Circuit Judge.*

Philadelphia, February 19, 1914.

Endorsed: No. 1721. Order Reversing Judgment. Received & Filed Feb. 19, 1914. Saunders Lewis, Jr., Clerk.

322 UNITED STATES OF AMERICA,  
*Eastern District of Pennsylvania,*  
*Third Judicial Circuit, act:*

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be a true and faithful copy of the original transcript of record and proceedings in this Court in the case of Lehigh Valley Railroad Co., Plaintiff in Error, vs. Henry E. Meeker, Surviving Partner of the firm of Henry E. Meeker and Caroline H. Meeker, Doing Business under the trade name of Meeker and Company, Defendant in Error, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this tenth day of March, in the year of our Lord one thousand nine hundred and fourteen, and of the Independence of the United States the one hundred and thirty-ninth.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,

*Clerk of the U. S. Circuit Court of Appeals, Third Circuit.*



## 323 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which Lehigh Valley Railroad Company is plaintiff in error and Henry E. Meeker, Surviving Partner of the firm of Henry E. Meeker and Caroline H. Meeker, doing business under the trade name of Meeker & Company, is defendant in error, No. 1721, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Eastern District of Pennsylvania, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed  
324 into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-ninth day of April, in the year of our Lord one thousand nine hundred and fourteen.

JAMES D. MAHER,

*Clerk of the Supreme Court of the United States.*

325 [Endorsed:] File No. 24,151. Supreme Court of the United States, No. 1000, October Term, 1913. Henry E. Meeker, Surviving Partner, etc., vs. Lehigh Valley Railroad Company. Writ of Certiorari.

326 In the United States Circuit Court of Appeals for the Third Circuit.

HENRY E. MEEKER, Surviving Partner, etc.,

vs.

LEHIGH VALLEY RAILROAD COMPANY.

It is hereby agreed and stipulated between counsel for the plaintiff in error and the defendant in error in the above case, that the certified copy of the record therein from the Circuit Court of Appeals, presented to the Supreme Court with the petition for certiorari, may be taken as a return to the writ of certiorari, instead of requiring the certification to the Supreme Court of another transcript of said record.

Dated at Philadelphia, Pa., this first day of May, 1914.

HENRY E. MEEKER,

*Surviving Partner, etc.,*

(Signed)

By WM. A. GLASGOW, JR., *Attorney.*  
LEHIGH VALLEY RAILROAD  
COMPANY,

(Signed)

By JOHN G. JOHNSON, *Attorney,*  
Per J. W. BAYARD.



Endorsed: No. 1721. Stipulation. Received & Filed May 6, 1914. Saunders Lewis, Jr., Clerk.

327 UNITED STATES OF AMERICA,  
*Eastern District of Pennsylvania,*  
*Third Judicial Circuit, et.:*

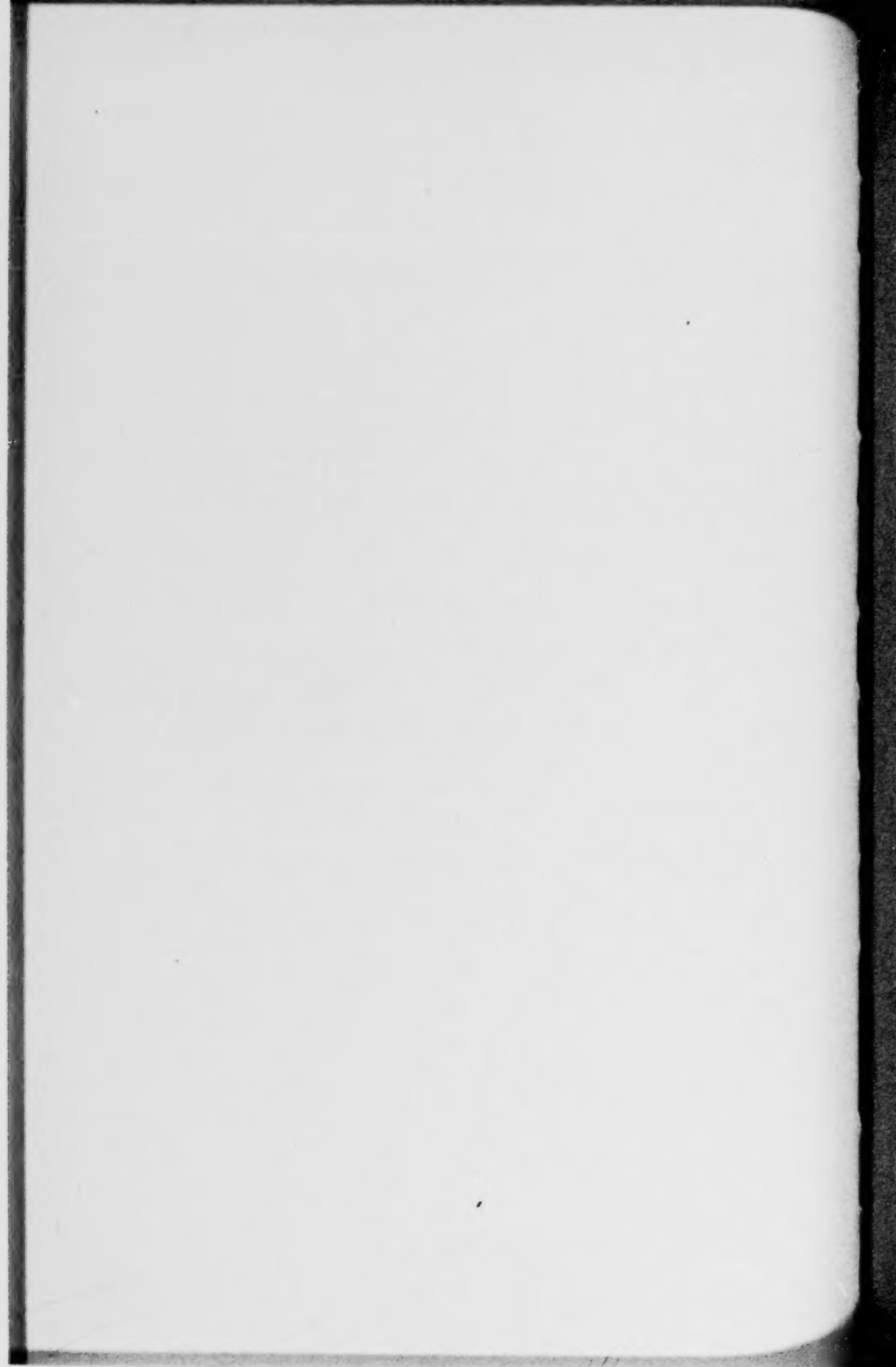
I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be a true and faithful copy of the original stipulation of counsel filed as to return to writ of certiorari to the Supreme Court of the United States, in the case of Henry E. Meeker, Surviving Partner, etc., vs. Lehigh Valley Railroad Company, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this seventh day of May in the year of our Lord one thousand nine hundred and fourteen, and of the Independence of the United States the one hundred and thirty-ninth.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,  
*Clerk of the U. S. Circuit Court of Appeals, Third Circuit.*

328 [Endorsed:] File No. 24,151. Supreme Court U. S., October term, 1914. Term No. 434. Henry E. Meeker, Surviving Partner, etc., Petitioner, vs. Lehigh Valley Railroad Company. Writ of certiorari and return. Filed May 8, 1914.



# TRANSCRIPT OF RECORD.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 435.

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HENRY E. MEEKER, PETITIONER,

vs.

LEHIGH VALLEY RAILROAD COMPANY.

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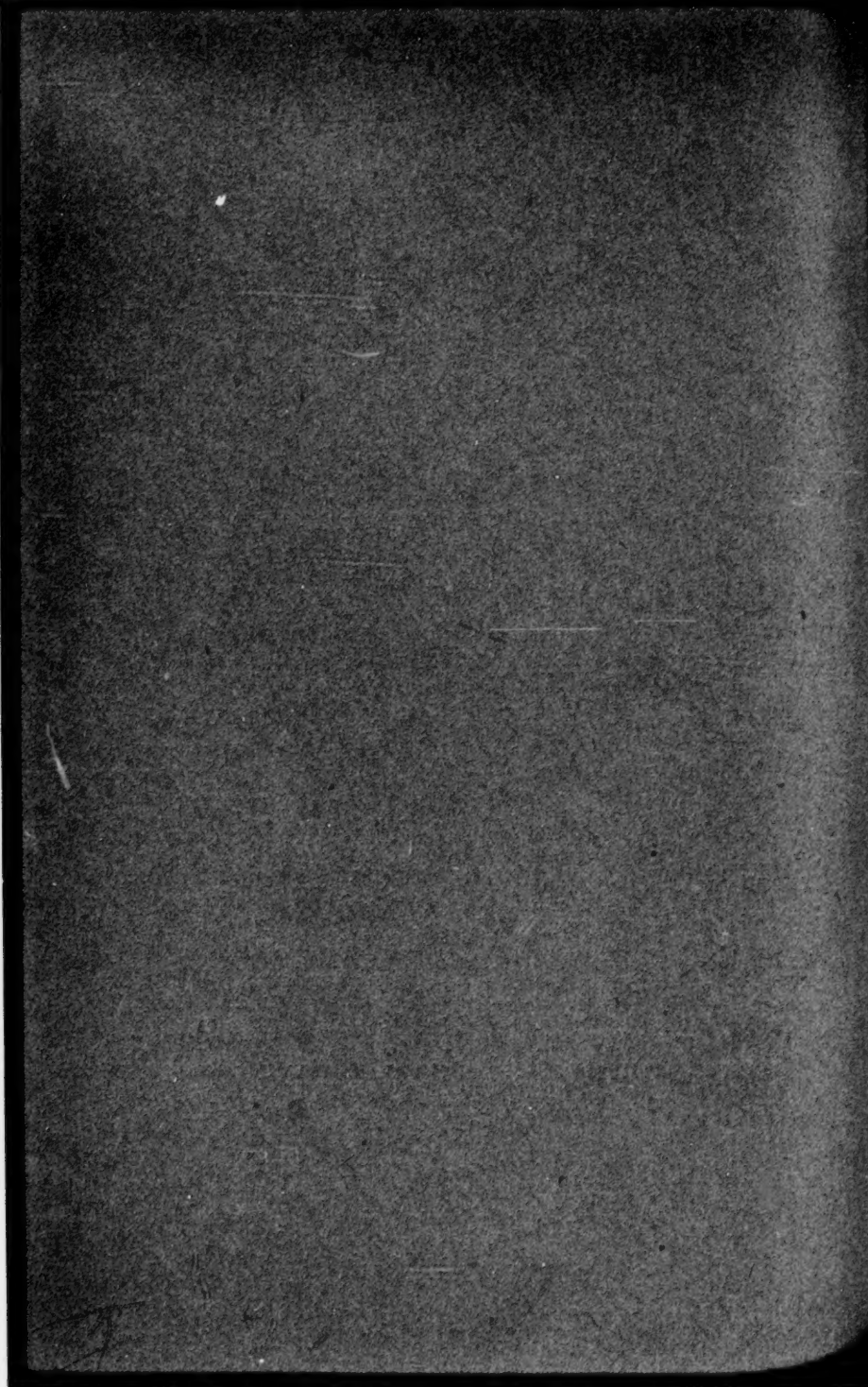
ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE THIRD CIRCUIT.

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PETITION FOR CERTIORARI FILED APRIL 9, 1914.

CERTIORARI AND RETURN FILED MAY 8, 1914.

(24,152)



(24,152)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 435.

HENRY E. MEEKER, PETITIONER,

*vs.*

LEHIGH VALLEY RAILROAD COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE THIRD CIRCUIT.

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*Transcript of Record.*

In the United States Circuit Court of Appeals for the Third Circuit,  
March Term, 1913.

No. 1720.

LEHIGH VALLEY RAILROAD COMPANY, Plaintiff-in-Error,

vs.

HENRY E. MEEKER, Defendant-in-Error.

In Error to the District Court of the United States for the Eastern  
District of Pennsylvania.

1

*Docket Entries.*

September Session, 1912.

2148.

HENRY E. MEEKER

vs.

LEHIGH VALLEY RAILROAD COMPANY.

John A. Garver, Wm. A. Glasgow, Jr.

Edgar H. Boles, John G. Johnson.

- |                 |     |   |
|-----------------|-----|---|
| 1912, September | 3.  | Petition filed.<br>Order directing defendant to plead, answer<br>or demur filed.  |
| " "             | 4.  | Proof of service of copy of order to plead,<br>etc., <b>filed.</b>  |
| " October       | 5.  | Plea filed.   |
| " "             | 8.  | Order to place case on trial list filed.  |
| " "             | 23. | Order for the appearance of Edgar H. Boles,<br>and John G. Johnson, Esquire, for de-<br>fendant, filed.   |
| " November      | 12. | Jury called.<br>Verdict for plaintiff, Thirteen Thousand One<br>Hundred and Sixty-one and 78-100 —<br>(\$13,161.78).  |
| " "             | 14. | Plaintiff's Bill of Costs filed.<br>Defendant's motion and reasons for new<br>trial filed.  |
| " December      | 19. | Argued sur motion for new trial.<br>Order refusing motion for new trial and<br>directing allowance of counsel fees filed.<br>Præcipe for judgment filed. Judgment ac-<br>cordingly. |



Judgment filed.

“

“

30. Bill of Exceptions filed.  
 Assignments of Error filed.  
 Petition for writ of error filed.  
 Order allowing petition for writ of error filed.  
 Bond sur writ of error, in sum of Twenty  
 six Thousand Three Hundred Twenty-  
 three and 56-100 Dollars filed.  
 Order approving bond sur writ of error filed.  
 Writ of error allowed and copy thereof  
 lodged in Clerk's office for adverse party.  
 Citation allowed and issued.  
 Stipulation for record sur writ of error filed.

1913, January

3. Citation returned, service accepted and filed.

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judge of  
 the District Court of the United States for the Eastern District of  
 Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of  
 the judgment of a plea which is in the said District Court, before  
 you, or some of you, between Henry E. Meeker, plaintiff, and Le-  
 high Valley Railroad Company, defendant, a manifest error hath  
 happened, to the great damage of the said Lehigh Valley Railroad  
 Company, as by its complaint appears. We being willing that error,

- 3 if any hath been, should be duly corrected, and full and  
 speedy justice done to the parties aforesaid in this behalf, do  
 command you, if judgment be therein given, that then under  
 your seal, distinctly and openly, you send the record and proceed-  
 ings aforesaid, with all things concerning the same, to the United  
 States Circuit Court of Appeals for the Third Circuit, together with  
 this writ, so that you have the same at the City of Philadelphia  
 within thirty days, in the said United States Circuit Court of Appeals,  
 to be then and there held, that the record and proceedings aforesaid  
 being inspected, the said Circuit Court of Appeals may cause further  
 to be done therein to correct that error, what of right, and according  
 to the laws and customs of the United States, should be done.

Witness the Honorable James B. Holland, Judge of the United  
 States District Court, at Philadelphia, the 30th day of December, in  
 the year of our Lord, one thousand nine hundred and twelve.

[SEAL.]

GEORGE BRODBECK,

*Deputy Clerk of the Circuit Court of the United States.*

Before Holland, J.

Allowed by the Court.

Attest:

GEORGE BRODBECK,

*Deputy Clerk.*

4 In the District Court of the United States for the Eastern  
District of Pennsylvania, September Sessions, 1912.

No. 2148.

HENRY E. MEEKER, Petitioner,  
vs.  
LEHIGH VALLEY RAILROAD COMPANY, Defendant.

*Petition.*

Filed Sept 3, 1912.

To the Honorable the Judges of the District Court of the United  
States for the Eastern District of Pennsylvania:

Your petitioner, Henry E. Meeker, humbly complaining shows  
your Honors:

I.

Your petitioner is lawfully and rightfully entitled to receive and  
does hereby claim of the Lehigh Valley Railroad Company, the de-  
fendant above named, the sum of Ten Thousand, Eight Hundred  
and Thirteen Dollars and Sixty cents (\$10,813.60), with interest at  
the rate of six per cent. (6%) per annum on said sum from Septem-  
ber 1, 1911, to July 15, 1912, amounting to Five Hundred and  
Sixty-seven Dollars and Five Cents (\$567.05); also the sum  
5 of One Thousand, Five Hundred and Twenty-Six Dollars and  
Fifty-three Cents (\$1,526.53); being an aggregate of Twelve  
Thousand Nine Hundred and Seven Dollars and Eighteen Cents  
(\$12,907.18), with legal interest thereon from July 15, 1912, as-  
and for damages and reparation in accordance with a report and order  
of the Interstate Commerce Commission, dated May 7, 1912, No.  
3235, Opinion No. 1880, a copy whereof is hereto attached, marked  
"Exhibit A", and prayed to be made and read as a part hereof, and  
in accordance with the several Acts of Congress in such case made  
and provided; and the petitioner shows that the defendant justly  
and legally owes to petitioner the sum above set forth, together with  
legal interest from July 15, 1912, and a reasonable attorney's fee to  
be taxed as part of the costs against defendant.

II.

The petitioner is a citizen and resident of the City of New York  
and State of New York, and, on and before April 13, 1908, was and  
still is engaged in the business of buying, selling and shipping  
anthracite coal under the trade name of Meeker & Company, hav-  
ing duly succeeded to the business which for many years was carried  
on by himself and Caroline H. Meeker under the same name. The  
said business involved the shipping of large quantities of anthracite  
coal over the lines operated by the defendant, from mines and

collieries situated in what is known as the Wyoming coal region Pennsylvania to tidewater at Perth Amboy, N. J., and thence to the New York market.

At all the times herein mentioned, the defendant was, and still is, a railroad corporation organized and existing under the laws of the State of Pennsylvania, and its road runs through the Eastern Judicial District of Pennsylvania and also it is a common carrier

engaged in interstate railroad transportation of passengers and property between points in the States of Pennsylvania

New Jersey and New York, over its own lines of road, as well as over other lines owned, leased, controlled or operated by it, and has its principal operating office in the Eastern Judicial District of Pennsylvania aforesaid.

### III.

From August 1, 1901, the defendant, which, prior to 1901, had not charged for transporting coal more than the difference between the market price of the coal at the breakers and the price at tidewater, although it had been publishing nominal tariff rates, began to exact and on and after April 13, 1908, and until April 13, 1910, exacted from all independent shippers a fixed charge per ton for carrying coal to tidewater, amounting to \$1.55 per ton for prepared coal, \$1.40 per ton for pea coal, \$1.25 per ton for buckwheat coal, and \$1.10 for coal smaller than buckwheat coal; and the said charges have ever since been continued, except that the rate for buckwheat coal was reduced from \$1.25 to \$1.20 per ton on January 10, 1909. The said charges were unjust, unreasonable and discriminatory and were forbidden by the Act to Regulate Commerce and particularly by Sections One and Three thereof.

As a result of the said excessive and unreasonable charges, the complainant was obliged to pay excessive rates upon all coal shipped by him to tidewater over the lines of the defendant.

The complainant was unable to continue his shipments of anthracite coal, except by complying with the demands of the defendant as to rates; and all his said payments were made under duress; and the complainant, in each and every case, made the said payments under protest, asserting that the rates charged were unreasonable and excessive, and notified the defendant that he reserved the right to recover back from it the amount of excess over the reasonable rate.

### 7

### IV.

From April 13, 1908, to April 13, 1910, the proper and reasonable charge for the transportation of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, New Jersey, was not to exceed \$1.40 per gross ton on prepared sizes, \$1.30 on pea, and \$1.15 on buckwheat coal. During said period, from April 13, 1908, to April 13, 1910, complainant shipped from said Wyoming coal region to Perth Amboy, New Jersey, forty-six thousand, seven hundred seventy-two and two one-hundredths (\$46,772.02) tons of coal of prepared sizes; twenty-six thousand, nine hundred seventy-two

and six one-hundredths (26,972.06) tons of pea coal, and twenty-two thousand, four and nine one-hundredths (22,004.09) tons of buckwheat coal, which said charges above set forth have been found and fixed by the Interstate Commerce Commission as the reasonable rates for the carriage of coal between the said points of origin and destination. During said period, however, and between said points of origin and destination, the defendant unjustly and unreasonably charged petitioner rates in excess of the rates above named, amounting to \$1.55 per ton for prepared sizes, \$1.40 per ton for pea coal, and \$1.25 per ton for buckwheat coal, which charges were continued during the whole of said period, and have been declared unjust and unreasonable, so far as they exceeded the rates fixed as aforesaid, by the Interstate Commerce Commission in its report and opinion No. 1880, Docket No. 3235, "Exhibit A", hereto attached, and subjected petitioner to loss and damage by excessive and unreasonable charges, as in this petition and in said report of the Interstate Commerce Commission aforesaid set forth.

## V.

8     The petitioner, on April 13, 1910, filed with the Interstate Commerce Commission a complaint setting forth the unjust, unreasonable and discriminatory practices and charges of defendant to the prejudice of petitioner, and in violation of the Act to Regulate Commerce, approved February 4th, 1887, and the several acts amendatory and supplementary thereto, and praying that a hearing be had upon the allegations set forth in said complaint, and that the Commission make an order requiring defendant to cease and desist from such practices, and fixing the rate for transportation of anthracite coal between the Wyoming coal region and Perth Amboy, New Jersey, awarding complainant reparation in damages to such an amount as said complainant had suffered loss by reason of the unjust and unreasonable charges of defendant. Defendant, being duly served with a copy of said complaint, made answer thereto; issue was joined, and the cause regularly heard and argued by all the parties thereto, and submitted, and a finding resulted, duly filed and reported by the Interstate Commerce Commission, at a general session at its offices in Washington, D. C., on Docket No. 3235, Opinion No. 1880, a copy of which finding, with the conclusions and orders of the Commission, is hereto attached and filed as "Exhibit A" in this case, and made a part of this petition. The said finding was regularly and properly made, ordering the defendant to make reparation to petitioner, as in Paragraph I, of this petition above set forth. In the said finding the opinion and conclusions of the Interstate Commerce Commission were expressly based upon another certain finding and opinion, filed by said Commission on June 8, 1911, in No. 1180, Opinion No. 1585, another proceeding instituted by petitioner as surviving partner of the firm of Meeker & Company, arising upon identical facts and alleging like unjust and unreasonable charges and practices during the period from August 1, 1900, to July 1, 1907, a copy of which said opinion, with the conclusions and

orders of the Commission, is hereto appended, and prayed  
9 be made and read as a part of this petition, and is marked  
"Exhibit B."

## VI.

Petitioner avers that a true copy of the aforesaid order of Interstate Commerce Commission, dated May 7, 1912, Docket No. 3235, Opinion No. 1880, was duly served upon defendant in the above entitled cause, and demand made that defendant pay petitioner the sum claimed in this petition, and as set forth in the aforesaid order of the Commission, "Exhibit A," hereto attached, but that defendant has wholly failed, neglected and refused to pay the sum or any part thereof, and that no such sum nor any part thereof has been paid by defendant or any one on its behalf, to petitioner or any one on his behalf. Wherefore petitioner has instituted this proceeding to enforce the aforesaid order, regularly and lawfully made under the Act to Regulate Commerce, approved February 4th, 1887, and the several acts amendatory or supplementary thereto.

Wherefore, the said petitioner, Henry E. Meeker, respectfully prays:

First. That your Honorable Court enter a rule and order upon the said defendant, the Lehigh Valley Railroad Company, to file its plea, answer or demurrer to this petition within thirty days from date of service of a copy of the same upon said defendant.

Second. That your Honorable Court will, by its order, fix a time and place for the trial of this cause, under the provisions of the Act to Regulate Commerce aforesaid.

Third. That your Honorable Court will hear, determine and adjudicate the matter involved in this cause hereinabove recited and the exhibits hereto attached.

10 Fourth. That your Honorable Court will enter judgment in favor of petitioner and against the said defendant, the Lehigh Valley Railroad Company, for the sum of Twelve Thousand Nine Hundred and Seven Dollars and Eighteen Cents (\$12,907.18) as hereinbefore set forth, with legal interest thereon from July 1912, and costs, including a reasonable attorney's fee.

Fifth. That your Honorable Court may make such other order or orders in the premises as the necessity of the case may require or to your Honorable Court may seem meet.

And your petitioner, as in duty bound, will ever pray, etc.

HENRY E. MEEKER

STATE OF NEW YORK,

*County of New York, ss:*

Henry E. Meeker, being duly sworn, deposes and says that he is the petitioner in the above entitled cause, and that the facts set forth in the foregoing petition are true and correct, to the best of his knowledge, information and belief.

HENRY E. MEEKER

Sworn and subscribed to before me this 30th day of August, A. D. 1912.

[SEAL.]

\_\_\_\_\_,  
*Notary Public.*

Notary Public, Kings County No. 1. Certificate filed in New York County No. 1. Kings County Register's No. 2529. New York County Register's No. 4028. Commission expires March 30, 1914. Customs Notary.

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No. 11188.

STATE OF NEW YORK,  
*County of New York, ss:*

I, William F. Schneider, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, do hereby certify, That Henry J. Dorgeloh has filed in the Clerk's Office of the County of New York, a certified copy of his appointment and qualification as Notary Public for the County of Kings, with his autograph signature, and was at the time of taking the annexed deposition duly authorized to take the same, and that I am well acquainted with the handwriting of said Notary Public, and believe that the signature to the annexed certificate is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court and County, the 31st day of August, 1912.

WILLIAM F. SCHNEIDER, *Clerk.*

## "EXHIBIT A."

*Opinion No. 1880.*

Interstate Commerce Commission.

No. 1180.

HENRY E. MEEKER and CAROLINE H. MEEKER, Co-partners,  
Trading as Meeker & Company,

vs.

LEHIGH VALLEY RAILROAD COMPANY.

No. 3235.

HENRY E. MEEKER

vs.

LEHIGH VALLEY RAILROAD COMPANY.

No. 1180.

HENRY E. MEEKER and CAROLINE H. MEEKER, Co-partners,  
Trading as Meeker & Company,

vs.

LEHIGH VALLEY RAILROAD COMPANY.

No. 3235.

HENRY E. MEEKER

vs.

LEHIGH VALLEY RAILROAD COMPANY.

Submitted February 27, 1912; Decided May 7, 1912.

Reparation awarded on account of unreasonable and discriminatory  
rates charged for the transportation of anthracite coal from the13 Wyoming region in Pennsylvania to Perth Amboy, N. J., in  
accordance with the conclusions announced in Meeker vs.  
L. V. R. R. Co., 21 I. C. C., 129.

William A. Glasgow, Jr., for complainants.

Frank H. Platt, George W. Field and E. H. Boles, for defendant.

*Supplemental Report of the Commission.*

McCHORD, Commissioner:

The original report in No. 1180, 21 I. C. C., 129, disposed of all  
the questions at issue except the claim for reparation, and the case  
was held open for the purpose of securing further information re-



garding that feature. A further hearing has been held, and complainant has presented exhibits showing the total number of tons of each variety of coal shipped and the amount of reparation due on such shipments. These exhibits have been examined by defendant and admitted to be correct.

In our original report we found that the rates charged complainant for the transportation of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., during the period from November 1, 1900, to August 1, 1901, were unjustly discriminatory, in violation of section 2 of the act to the extent that they exceeded the rates contemporaneously charged the Lehigh Valley Coal Company under the contract then in effect between that company and defendant; and we further found that the rates in effect from August 1, 1901, to July 17, 1907, were unreasonable to the extent that they exceeded rates of \$1.40 per gross ton on prepared sizes, \$1.30 on pea and \$1.15 on buckwheat.

On basis of our conclusions in the former report, and upon consideration of the evidence adduced at the hearing upon the question of reparation, we now find that during the period from November 1, 1900, to August 1, 1901, complainant shipped from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., 55,257.75 tons of coal of prepared sizes, 16,689.76 tons of pea coal, 11,448.93 tons of buckwheat coal, and 4,926.77 tons of rice coal, and paid charges thereon, amounting to \$129,989.18, at the rates found to have been unjustly discriminatory; that complainant has been damaged to the extent of the difference between the amount which he did pay and \$118,979.85, the amount which he would have paid had he been given the benefit of the rates applied by defendant to similar shipments of the Lehigh Valley Coal Company; and that he is, therefore, entitled to an award of reparation in the sum of \$11,009.33, with interest thereon from August 1, 1901. We find further that from August 1, 1901, to July 17, 1907, complainant shipped from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., 246,870.15 tons of coal of prepared sizes, 106,051.09 tons of pea coal and 87,250 tons of buckwheat coal, and paid charges thereon amounting to \$685,375.27, at the rates found to have been unreasonable; that complainant has been damaged to the extent of the difference between the amount which he did pay and \$626,945.62, the amount which he would have paid at the rates found reasonable, less \$193.20 deducted by stipulation of all parties on account of certain claims already paid; and that he is, therefore, entitled to an additional award of reparation in the sum of \$58,236.45, with interest, amounting to \$27,750.64, on the individual charges comprising said sum from the dates of payment thereof to September 1, 1911, together with interest on said sum of \$58,236.45 from September 1, 1911.

With the exception of the reparation features, the issues involved in No. 3235 have been passed upon by the Commission in No. 1180. The latter case covered the period from November 1, 1900, to July 17, 1907, while the instant case is designed to secure reparation upon

15 shipments which moved between July 17, 1907, and April 13, 1910. The petition in the present case, therefore, resolves itself into a prayer for reparation on shipments moving subsequent to the period covered by the original report, on basis of the conclusions announced in that report.

In No. 1180 the complaint attacked the reasonableness of rates charged by defendant for the transportation of various sizes of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., and asked reparation. On June 8, 1911, the Commission rendered its decision in that case. The petition in the present case was filed on April 13, 1910, or about a year prior to our decision in No. 1180. As before stated, it attacks the same rates that were found unreasonable in No. 1180, and asks reparation on shipments moving from July 17, 1907, to April 13, 1910.

The former case was filed with the Commission within one year from the passage of the law of June 29, 1906, and consequently was not limited to causes of action that accrued within two years prior to the filing of the complaint. The present proceeding, however, was instituted more than one year subsequent to the passage of that law, and is, therefore, subject to the two-year limitation of the statute. Complainant's prayer for reparation on shipments moving more than two years prior to the filing of the complaint in this case must be denied.

On basis of our decision in No. 1180, and upon consideration of the evidence submitted at the hearing of the present case regarding the amount of reparation due complainant, we now find that the rates exacted by defendant for the transportation of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., during the period from April 13, 1908, to April 13, 1910, were unreasonable to the extent that they exceeded rates of \$1.40 per gross ton on prepared sizes, \$1.30 on pea and \$1.15 on buckwheat; that complainant shipped from said point of origin to said destination during the period above set forth, 46,772.02 tons of coal of  
16 prepared sizes, 26,972.06 tons of pea coal and 22,004.09 tons of buckwheat coal; that complainant paid charges thereon, amounting to \$136,663.41, at the rates herein found to have been unreasonable, and was damaged to the extent of the difference between the amount which he did pay and \$125,849.81, the amount which he would have paid at the rates above found reasonable; and that he is, therefore, entitled to an award of reparation in the sum of \$10,813.60, with interest amounting to \$1,526.53 upon the individual charges comprising said sum from the dates of payment thereof to September 1, 1911, together with interest on said sum of \$10,813.60 from the 1st day of September, 1911.

The exhibits showing details respecting the shipments upon which reparation is asked are too extensive to be set forth in this report. But inasmuch as the accuracy of the figures in said exhibits respecting the shipments made, freight charges paid and reparation due, is conceded of record by defendant, we deem it unnecessary to make detailed findings respecting the numerous shipments involved.

Orders will be issued in accordance with the findings herein announced.

*Orders.*

At a General Session of the Interstate Commerce Commission Held at Its Office, in Washington, D. C., on the 7th Day of May, A. D. 1912.

No. 1180.

HENRY E. MEEKER and CAROLINE H. MEEKER, Co-partners, Trading as Meeker & Company,

vs.

LEHIGH VALLEY RAILROAD COMPANY.

17 This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That defendant Lehigh Valley Railroad Company be, and it is hereby authorized and required to pay unto complainant, Henry E. Meeker, on or before the 15th day of July, 1912, the sum of \$11,009.33, with interest thereon at the rate of 6 per cent. per annum from the 1st day of August, 1901, as reparation for unjustly discriminatory rates charged for the transportation of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., which rates so charged have been found by this Commission to have been unjustly discriminatory, as more fully and at large appears in and by said report of the Commission.

It is further ordered, That defendant Lehigh Valley Railroad Company be, and it is hereby authorized and required to pay unto complainant, Henry E. Meeker, on or before the 15th day of July, 1912, the sum of \$58,236.45, with interest thereon at the rate of 6 per cent. per annum, amounting to \$27,750.64, upon the various individual charges comprising said sum, from the dates of payment thereof to September 1, 1911, as itemized in complainant's Exhibit 2, together with interest at the rate of 6 per cent per annum on said sum of \$58,236.45 from September 1, 1911, as reparation for unreasonable rates charged for the transportation of various shipments of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., which rates so charged have been found by this Commission to have been unreasonable, as more fully and at large appears in and by said report of the Commission.

18 No. 3235.

HENRY E. MEEKER

v.

LEHIGH VALLEY RAILROAD COMPANY.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full in-

vestigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That defendant Lehigh Valley Railroad Company be, and it is hereby authorized and required to pay unto complainant, Henry E. Meeker, on or before the 15th day of July, 1912, the sum of \$10,813.60. with interest at the rate of 6 per cent. per annum, amounting to \$1,526.53 upon the various individual charges comprising said sum, from the dates of payment thereof to September 1, 1911, as itemized in complainant's Exhibit 1, together with interest at the rate of 6 per cent. per annum on said sum of \$10,813.60 from September 1, 1911, as reparation for unreasonable rates charged for the transportation of various shipments of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., which rates so charged have been found by this Commission to have been unreasonable, as more fully and at large appears in and by said report of the Commission.

\* By the Commission.

[SEAL.]

JOHN H. MARBLE, *Secretary.*

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"EXHIBIT B."

*Opinion No. 1585.*

Before the Interstate Commerce Commission.

No. 1180.

HENRY E. MEEKER and CAROLINE H. MEEKER, Co-partners, Trading as Meeker & Company,

vs.

LEHIGH VALLEY RAILROAD COMPANY.

Decided June 8, 1911.

*Report and Order of the Commission.*

No. 1180.

HENRY E. MEEKER and CAROLINE H. MEEKER, Co-partners, Trading as Meeker & Company,

vs.

LEHIGH VALLEY RAILROAD COMPANY.

Submitted May 15, 1911. Decided June 8, 1911.

1. Upon shipments of anthracite coal made by complainants from the Wyoming region in Pennsylvania to Perth Amboy, N. J., during the period from November 1, 1900, to August 1, 1901, the rates collected by defendant were unjustly discriminatory and resulted in damage to complainant, for which reparation will be awarded.

2. Defendant's present rates for the transportation of anthracite coal in carloads from the Wyoming region in Pennsylvania to Perth Amboy, N. J., of \$1.55 per gross ton on prepared sizes, \$1.40 on pea coal and \$1.20 on buckwheat coal, found unreasonable to the extent that they exceed \$1.40 on prepared sizes, \$1.30 on pea coal and \$1.15 on buckwheat coal, which latter rates are established as maxima for the future, reparation to be awarded on basis of the latter rates as to shipments made by complainants since August 1, 1901.

William A. Glasgow, Jr., and John A. Garver for complainants.  
J. F. Schaperkottter, Frank H. Platt and George W. Field for defendant.

*Report of the Commission.*

*McCHORD, Commissioner:*

Henry E. Meeker and Caroline H. Meeker, co-partners, trading as Meeker & Company, complainants in this proceeding, were, when the complaint was filed, engaged in the business of buying, shipping and selling anthracite coal over the lines of the Lehigh Valley Railroad Company from mines and collieries situated in the Wyoming coal region of Pennsylvania to tidewater at Perth Amboy, N. J., and thence to the New York market.

During the pendency of the proceeding Caroline H. Meeker died, and it has been continued to be prosecuted in the name of the surviving partner, Henry E. Meeker.

Complainants were not mine operators, but merely dealers on the New York market. The coal shipped by them to Perth Amboy was purchased from the Stevens Colliery, which is situated near the city of Wilkes-Barre, Pa., on the West Pittston branch of defendant's Wyoming Division, 1.5 miles from Coxton and 165 miles from Perth Amboy.

21. Practically all the anthracite coal deposits in the United States are in nine counties in the eastern portion of Pennsylvania, in an area comprising about 496 square miles. The different coal fields are as follows: The northern, commonly called the Wyoming, from which the shipments involved in this proceeding were made; the eastern middle and western middle, which together are known as the Lehigh regions, and the southern, which also bears the name of Schuylkill. All three regions are reached by the Lehigh Valley Railroad. The northern field is some 55 miles in length, has a maximum width of about 5 miles, and lies northwesterly of the Pocono Mountains, in the valley of the Lackawanna and Susquehanna Rivers. From this valley the carriers find comparatively easy outlets to points north and west, along the rivers mentioned, but coal shipped to the east over defendant's line has to be carried over the mountains at a maximum elevation of 1,750 feet. The lowest portions of the valley are about 500 feet above the level of the sea.

The coal mines are usually located at points separated from carrier's main tracks by distances varying from a fraction of a mile

to several miles, and connected with such tracks by lateral lines called branches or spurs. These branches are sometimes constructed by the mine operators, but generally by the carriers. The manner in which the coal is handled at the mine openings and while in process of transportation is as follows: For convenience in handling the coal at the mouths of the mines and preparing it for market, buildings called "breakers" are erected, and in these buildings the large lumps are broken and the coal separated into required sizes by being run over a series of screens of appropriate mesh. Some lump coal is taken as it comes out of the mine and is marketed for use either in furnaces or locomotives, but the demand for this size is limited. The sizes usually transported are the following:

22 Broken or grate, which goes through a mesh 4 inches square and over a mesh  $2\frac{3}{4}$  inches square.

Egg, which goes through a mesh  $2\frac{3}{4}$  inches square and over a mesh 2 inches square.

Stove, which goes through a mesh 2 inches square and over a mesh  $1\frac{3}{8}$  inches square.

Chestnut, which goes through a mesh  $1\frac{3}{8}$  inches square and over a mesh three-fourths inch square.

Pea, which goes through a mesh three-fourths inch square and over a mesh one-half inch square.

Buckwheat No. 1, which goes through a mesh one-half inch square and over a mesh one-fourth inch square.

Buckwheat No. 2, or rice, which goes through a mesh one-fourth inch square and over a mesh one-eighth inch square.

Smaller sizes are known as buckwheat No. 3 and culm.

The sizes above pea are known as prepared sizes and are used principally for domestic purposes. The smaller sizes are used almost entirely for steam purposes.

Formerly the smaller sizes had no commercial value and were allowed to accumulate as waste product in banks at the mines. But changes made in the grates of furnaces have facilitated their use for steam purposes, and such use has been increasing rapidly during recent years. By means of "washeries" large quantities of the smaller sizes have been recovered from these waste or culm banks and sent to market to satisfy this increased demand. However, only comparatively small prices can be obtained for these smaller sizes.

The cars are loaded directly from the breakers by means of chutes. The loaded cars are then hauled to a convenient place of concentration along the main track, designated a gathering or assembly

23 point, where they are drilled into trains according to destination and with some reference to the sizes. The coal destined to tidewater points is hauled in trains to yards adjacent to the docks, where a more particular separation takes place; that is to say, coal of particular qualities and sizes is placed on separate tracks and afterwards transferred to the boats or storage bins in accordance with the requirements of different purchasers.

For the year ended June 30, 1908, the Lehigh Valley Railroad Company carried altogether 11,206,774 gross tons of anthracite coal, upon which its gross revenue was \$14,908,923.08, showing an aver-



age revenue of \$1.2411 per gross ton, or \$0.00737 per net ton per mile. During the same period the Lehigh Valley's entire freight revenue amounted to 23,643,001 gross tons, its gross revenue to \$30,186,581.72, its average rate per gross ton to \$1.277, and its average rate per net ton per mile on all traffic, including anthracite coal, to \$0.00630. It will thus be seen that during 1908 anthracite coal constituted approximately 47 per cent. of defendant's freight tonnage and produced approximately 49 per cent. of its freight revenue. Complainants shipped, between August 1, 1901, and June 30, 1907, 499,901.47 gross tons of anthracite coal, upon which they paid total freight charges of \$709,637.67, resulting in an average rate per net ton per mile (based on the average mileage from the Wyoming region to Perth Amboy of 170 miles) of \$0.00745.

It appears that prior to 1900 various anthracite coal carrying railroads in Pennsylvania, in their endeavor to control the output and sale of anthracite coal, had formed other and distinct corporate organizations, usually known as "coal companies," but which through stock ownership were owned, officered and controlled by the railroads which brought them into existence. Such was the relation that existed between the Lehigh Valley Railroad Company and the Lehigh Valley Coal Company. The function of the Lehigh

Valley Coal Company was to acquire, hold and operate vast  
24 tracts of anthracite coal lands, and to make contracts with independent operators for their entire output. In connection with the purchase of coal from independent operators there came into existence what are known as "percentage contracts." The Lehigh Valley Coal Company regularly for a period of years entered into such contracts with independent coal operators along the line of the Lehigh Valley Railroad. Under these percentage contracts the Lehigh Valley Coal Company agreed to pay the independent operators fluctuating prices for their coal at the mines, to be arrived at on the basis of certain percentages of the average market prices of the various grades of anthracite coal at tidewater. An accurate check was kept on the tidewater market prices, and monthly settlements were made. Under the contract which was in effect during the greater part of the year 1900, the agreement by the Lehigh Valley Coal Company was to pay the coal operator 60 per cent. of the tidewater price on the highest grade of anthracite coal and lesser percentages on the lower grades. This contract was therefore called the "60-per-cent. contract," due to the fact that that percentage figure applied on the highest grade of coal.

Although the Lehigh Valley Railroad Co. was not nominally a party to any of the percentage contracts entered into by the Lehigh Valley Coal Company, yet it made a practice of settling for the freight charges on coal purchased and shipped by the Lehigh Valley Coal Company at the differences between the amounts paid to the coal operators and the average market prices at tidewater. The result therefore was, taking the highest grade of coal as an illustration, that if the Lehigh Valley Coal Company paid the independent operator 60 per cent. of the tidewater price, the Lehigh Valley Railroad Company transported the coal for 40 per cent. of said tide-



water price. It will thus be seen that, although the matter of freight rates was not mentioned in the contracts made by the Lehigh Valley Coal Company with the independent operators, yet the freight rates were directly dependent upon said contracts.

It appears that if an independent coal operator lacked established business connections or capital, it was to his interest to enter into the percentage contract with the Lehigh Valley Coal Company. Meeker & Company, however, had been in business as sales agents for coal since 1889, and their facilities for selling were adequate. They therefore made a contract with the Stevens Coal Company for practically their entire output of coal. There were also a number of other shippers of anthracite coal over the lines of the Lehigh Valley Railroad, and in order to place them on an equality with the Lehigh Valley Coal Company, they were accorded the same rates as were accorded to that company.

It was the custom for all shippers, including the Lehigh Valley Coal Company, to pay the tariff rates on the various grades of anthracite to tidewater, and then by means of monthly settlements be given the benefit of the rates upon the percentage basis, which rates were known as "adjusted rates," and were usually considerably lower than the tariff rates; but which at certain periods, owing to advancing prices of anthracite coal, were higher than the tariff rates. The general purpose of the adjusted rates was, however, to give the shippers the benefit of rates lower than the tariff rates, and, upon the whole, they accomplished this result, and the evidence shows that they were impartially applied on all shipments during the greater part of the time that they were in effect.

In November, 1900, the parties interested (i. e., the Lehigh Valley Railroad Company, the Lehigh Valley Coal Company and the coal producers) began to consider making a change in the terms of the then existing 60-per-cent. contract. It seems that the subject was not of easy solution, and that the negotiations dragged along for nine months, until August 1, 1901, at which time an agreement was reached whereby the price of the highest grade of coal at the breakers was to be 65 per cent. of the tidewater market prices, instead of 60 per cent. as formerly, with related increases on the lower grades. From almost the beginning of these negotiations, it seems to have been the understanding of all parties that whatever arrangement was finally reached would be made retroactive until November 1, 1900, the date of the beginning of the negotiations, and that the Lehigh Valley Railroad Company would readjust its freight charges retroactively in conformity with the new scale of prices not only upon shipments made by the Lehigh Valley Coal Company, but upon all coal shipped by independent dealers.

On the first hearing of this case counsel for the Lehigh Valley Railroad Company took the position that the tariff rates had been paid by all coal shippers during the nine months of negotiations; and that when, on August 1, 1901, it was determined that the 65-per-cent. basis should govern retroactively to November 1, 1900,

the extra cost of the coal on this basis was paid by the Lehigh Valley Coal Company to the coal operators. Hence it was argued that the Lehigh Valley Railroad Company, having charged its full tariff rates to all, and the coal company having paid the increased price, there had been no discrimination against Meeker & Company during said nine months. As the evidence in support of this argument was meager and unsatisfactory, a supplemental hearing was had at which additional evidence was asked upon this point. The facts as disclosed by that hearing were as follows:

The Lehigh Valley Railroad Company during the period from November 1, 1900, to August 1, 1901, endeavored to settle with all shippers upon the basis of adjusted rates, under the 60 per cent. contract. During the months of November, December, January,

February and March the adjusted rates upon some of the  
27 grades were higher than the tariff rates, owing to the high market price of coal at tidewater. Meeker & Company were expecting the 65-per-cent. contract to be adopted, and believed that the effect of its adoption would be that they would get the benefit of adjusted rates which were lower than the tariff rates, whereas under the 60-per-cent. contract, they were being called on to pay adjusted rates which were in many instances higher than the tariff rates. They protested against paying money to the Lehigh Valley Railroad Company under the 60-per-cent. basis, which they expected to be subsequently refunded when the 65-per-cent. contract was adopted. They therefore objected to settling upon the basis of the 60-per-cent. "adjusted rates," even as early as November and December, 1900, but under some arrangement or understanding with the coal freight agent of the Lehigh Valley Railroad Company, settlements were made for November and December, in order that the books of that company might be closed for the year. Thereafter they refused to settle upon the basis of the 60-per-cent. adjusted rates, even in those instances where settlement would have involved a refund to them from the tariff rate which they had paid. Their idea seems to have been to have nothing whatever to do with settlements upon the 60-per-cent. basis, because they believed the whole matter would have to be subsequently undone and refigured upon the 65-per-cent. basis.

During the earlier months of 1901, owing to the market prices of coal, the adjusted rates upon the 60-per-cent. basis were in the main higher than the tariff rates; but in April, May and June, and possibly thereafter, owing to the lower prices of coal, the adjusted rates became less than the tariff rates. The evidence does not clearly show whether independent shippers, other than Meeker & Company, paid the adjusted rates, when they were higher than the tariff rates, but the presumption is that some of them at least  
28 did so. It appears, however, that shippers other than Meeker & Company accepted refunds from the Lehigh Valley Railroad Company, in such instances as the adjusted rates were lower than the tariff rates.

When it was finally determined, on August 1, 1901, to adopt the 65-per cent. contract, the Lehigh Valley Railroad Company made

a systematic effort to pay back to all shippers, including the Lehigh Valley Coal Company, such amounts as may have been paid during the period November 1, 1900, to August 1, 1901, in excess of the tariff rates. There was not, however, at that time any attempt made to collect back from shippers refunds which may have been made to them from month to month when the "adjusted rates" were lower than the tariff rates. It thus appears that the attempted readjustment to basis of tariff rates which the Lehigh Valley Railroad Company sought to make upon the adoption of the 65-per-cent. contract was only partial. Meeker & Company were offered refunds of the excess over tariff rates which had been paid in November and December, 1900, but refused to accept the same, stating in a letter of refusal that they would insist upon settlement of freight rates upon the basis of the newly adopted 65-per-cent. contract.

This brings us to the contention of complainants that the payment of the increased retroactive prices to the coal producers by the Lehigh Valley Coal Company was in fact a payment by the Lehigh Valley Railroad Company, and therefore equivalent to a readjustment by the latter company of its freight rates upon the basis of the 65-per-cent. contract on such coal as was shipped by the Lehigh Valley Coal Company during the period from November 1, 1900, to August 1, 1901.

Investigation of the books of the Lehigh Valley Railroad Company disclosed the fact that subsequent to August 1, 1901, there were extraordinary cash advances made by that company to the Lehigh Valley Coal Company, and one of the purposes of the supplemental hearing was to ascertain whether said cash advances included the sum which the Lehigh Valley Coal Company paid to the coal operators under the 65-per-cent. contract which was made retroactive for the nine months from November 1, 1900, to August 1, 1901.

On that hearing it developed that at the end of the year November 30, 1898, the Lehigh Valley Coal Company owed the Lehigh Valley Railroad Company \$1,596,650; that at the end of the year November 30, 1899, the amount of its indebtedness remained unchanged; that during the fiscal year November 30, 1899, to November 30, 1900, there was a strike, production was curtailed and sales were made from stored coal, whereby the coal company was enabled to reduce its stock of coal, and its accounts receivable due from customers for coal sold; that as the result of this condition the indebtedness of the coal company to the railroad company, on November 30, 1900, had been reduced to about \$500,000. The unusual advances made by the railroad company to the coal company in 1901 were necessitated by the resumption of mining operations after the cessation of the strike. Counsel for the Lehigh Valley Railroad Company introduced in evidence the following extracts from the annual report of the company to its stockholders for 1901, viz:

Under the existing arrangements, the Lehigh Valley Coal Company is compelled to depend upon the railroad company for working capital to carry on its operations.

\* \* \* \* \*

The suspension of mining during the period of the strike last year and the sale of the greater portion of coal in stock enabled the coal company to repay to the railroad company a large proportion of the amount advanced by the latter company for this purpose.

30 And counsel for complainant was permitted to read into the record the following additional extract from the same report, viz:

The uninterrupted continuance of operations during the fiscal year just closed (i. e., the year ending November 30, 1901) restored normal conditions, necessitating advances by the railroad company of a million dollars, which amount is more than represented by the increased tonnage and value of the coal in stock as compared with November 1st last.

The general auditor of the Lehigh Valley Railroad Company testified that the amount which the Lehigh Valley Coal Company had to pay the coal operators under the 65-per-cent. contract, which on August 1, 1901, became effective retroactively to November 1, 1900, was \$231,090.19. He further testified that the deficit of \$491,576.65 shown in the operations of the Lehigh Valley Coal Company for the year ended November 30, 1901, would have been less by \$231,090.19 had it not been for the payment by the coal company to the operators of the increased prices under the retroactive 65-per-cent. contract.

In view of the admissions upon the supplemental hearing the conclusion seems inevitable that the financial condition of the Lehigh Valley Coal Company was not such as to have enabled it to pay the \$231,090.19 to the coal operators out of its own treasury, and that not only this amount, but much larger sums, were advanced by the railroad company to the coal company during the year 1901 for the purpose of enabling the latter to carry on its operations.

It is alleged in the petition that between November 1, 1900, and August 1, 1901, complainants, Meeker & Company, shipped 88,336 tons of coal from the Wyoming region to tidewater at Perth Amboy, N. J., a distance of about 165 miles, on which they paid a sum total as freight charges, amounting to \$129,989.18; whereas upon the 35-per cent. basis which complainants contend was the necessary  
31 result of the 65-per-cent. contract entered into by the Lehigh Valley Coal Company on August 1, 1901, the freight charges should have been only \$118,867.21, the amount of overpayment by complainants being \$11,121.97.

From the facts disclosed it is apparent that the payment of the \$231,090.19, which was ostensibly made by the Lehigh Valley Coal Company to the coal operators from which it had purchased coal during the period from November 1, 1900, to August 1, 1901, was in fact made from funds advanced as cash by the Lehigh Valley Railroad Company to the Lehigh Valley Coal Company, and was therefore the equivalent of a readjustment of the freight rates upon the basis of the 65-per-cent. contract on such coal as was purchased by the Lehigh Valley Coal Company and shipped to tidewater during the period from November 1, 1900, to August 1, 1901. We are of the opinion and so hold that complainants have sustained the alle-

gation of unjust discrimination under the second section of act. Reparation, with interest from August 1, 1901, will be awarded on this account.

Since August 1, 1901, complainants and other shippers have paid full tariff rates on coal from the Wyoming region to Perth Amboy, which rates are as follows:

	Per gross
Prepared sizes .....	\$1.55
Pea coal .....	1.40
Buckwheat coal.....	1.20
Aug. 7, 1904, to Jan. 10, 1905.....	1.25
All sizes below buckwheat.....	1.10

It is alleged in the complaint that any charge in excess of \$1 on all grades subsequent to August 1, 1901, is unreasonable, and reparation is asked by complainants, upon the basis of the suggested rate of \$1, upon all shipments made by them over the Lehigh Valley Railroad during the period August 1, 1901, to July 1, 1907, the aggregate amount of reparation sought during said period being \$210,351.

In a later complaint, filed April 13, 1910, No. 3235, styled Henry E. Meeker vs. Lehigh Valley Railroad Company, complainant sought reparation on the basis of a rate of \$1 on all grades of coal shipped during the period July 1, 1907, to April 1, 1910, alleging a total overcharge during said period of \$55,290.73.

As the subject-matter of the two complaints is the same, in so far as the reasonableness of the rates is concerned, the disposition of the later case will perhaps be determined by the conclusions reached in this case.

When complainants filed their complaint in July, 1907, they elected as to the period from November 1, 1900, to August 1, 1901, to rely entirely upon a violation of the second section of the act, and therefore claimed reparation only to the extent of \$11,121.97, on the ground of discrimination during said period in favor of the Lehigh Valley Coal Company, claiming that the effect of the retroactive one per-cent. contract of August 1, 1901, was to readjust upon a low basis the freight rates which had been paid by the Lehigh Valley Coal Company during said period.

When the case came on for hearing in March, 1909, complainant's counsel announced orally before the Commission, and not by way of amendment of their petition, that they desired to claim additional reparation in the sum of \$41,644.82—the excess paid over \$1 per ton during the period from November 1, 1900, to August 1, 1901.

Complainants' counsel stated in his brief filed with the Commission, but not by way of amendment to his petition, that by reason of the fact that the Commission may not be convinced that \$1 per ton is a reasonable rate on all grades of coal to tidewater, he desired to put his claim for reparation in an alternative form, viz: That in event the Commission should not approve the suggested rate of \$1 per ton on all grades of coal, complainants are entitled to reparation in the amount of \$156,144.92, the amount

which the freight charges which they have paid exceed what said charges would have been upon the basis of the average rate per ton per mile on all freight transported by the Lehigh Valley Railroad Company. In support of this claim for reparation, he sets forth an exhibit in his brief, which covers the calendar years 1902 to 1907, inclusive. This claim, therefore, does not extend back to November 1, 1900, as do his other claims; but it includes the latter half of 1907, and therefore extends six months beyond the period covered by his larger claim for reparation on the basis of the proposed \$1 rate.

Complainants insist that the average rate per ton per mile upon coal ought not to exceed the average rate per ton per mile upon all freight traffic, and base their claim for reparation in large part upon the assumption that the higher rate per ton-mile on coal is proof of the unreasonableness of the rates in question. Defendant answers this contention by asserting that the initial service in connection with the transportation of coal, commonly called collection or assembly, and the terminal service at Perth Amboy, are both difficult and complicated, and involve extraordinary operating expenses, as well as the permanent investment of a large amount of capital, which are not incurred in the transportation of other classes of freight. The transportation of coal from the mining regions to Perth Amboy is described in detail in the record and may be summarized as follows:

Coal from the Wyoming region around Wilkes-Barre, after being assembled from the various branches, is carried east by way of Coxton or Pittston Junction over what is known as the Mountain Cut-Off, thence by way of Avoca, Penn Haven Junction and Phillipsburg to South Plainfield, where it leaves the main line for Perth Amboy. Coal from the Lehigh region is collected from the various branches in the neighborhood of Hazleton, Lumber Yard, New Boston and Mount Carmel, and carried to Penn Haven Junction, from which point it follows the same course as the Wyoming coal. Coal from the Schuylkill region reaches the main line at Lizard Creek Junction from the regions around Blackwood. Coal in transit from the Wyoming region to Perth Amboy passes over defendant's Wyoming and New Jersey & Lehigh divisions. The Wyoming division extends from Sayre to Mauch Chunk, and includes the territory known as the Wyoming coal region, or the southern part of the northern coal field, and touches also the Lackawanna coal region. The New Jersey & Lehigh division extends from Easton to the sea end of the Perth Amboy docks. Defendant's Mahanoy & Hazleton division covers a portion of the Lehigh and a portion of the Schuylkill regions in the middle and southern coal fields. This division meets the main line at Penn Haven Junction.

Coal is brought from the collieries to assembly yards, from which it is in turn taken to classification yards, where trains are made up for the main-line hauls. In the Wyoming division there are two such yards, Port Bowkley and Coxton, the former being an assembly yard and the latter both a classification and assembly yard.



At Perth Amboy defendant has adequate terminal facilities, storage bins, two docks and appropriate equipment for the handling of anthracite coal. Ten locomotives and crews are employed by the company in handling coal at the terminal. At the entrance to the terminal are a series of tracks, eight in number, about one-half mile long, known as the receiving tracks, upon which trainloads of coal are left by the road crews. Upon these tracks employees inspect and check the cars and designate by marks thereon the various kinds and sizes of coal, region and colliery from which shipped, 35 and such other information as may be necessary for proper unloading into vessels or storage bins. After the cars are so marked they are classified for purposes of disposition. When orders are received the coal is removed to the docks or stocking bins, both of which are provided with suitable trackage facilities.

Complainants' contention that the rates to Perth Amboy are unreasonable is based in part upon the testimony of certain persons who were formerly officers of the Delaware, Susquehanna & Schuylkill Railroad and of Coxe Brothers & Company. For many years prior to 1905, Coxe Brothers & Company were engaged in mining and shipping anthracite coal from their extensive properties in the Lehigh region. They owned and operated the Delaware, Susquehanna & Schuylkill Railroad, a road about 28 miles in length, which reached their different collieries and connected with the Lehigh Valley Railroad at a place called Lumberyard or Stockton Junction.

After January, 1894, the Coxe coal, instead of being carried to Perth Amboy in the trains of the Lehigh Valley, was transported to tidewater in the trains of the Delaware, Susquehanna & Schuylkill Railroad, and by its motive power, under a trackage contract between that road and the Lehigh Valley, which provided for the use of the tracks of the latter company from Stockton Junction to Perth Amboy, a distance of approximately 125 miles. The agreed compensation to the Lehigh Valley for the use of its tracks was  $27\frac{3}{4}$  mills per gross ton per mile, or 35.94 cents per gross ton for the haul from Stockton Junction to Perth Amboy. The Lehigh Valley unloaded the coal at Perth Amboy into vessels or bins and performed other terminal service, for which it charged Coxe Brothers 12 cents per ton. Additional payments were agreed upon from time to time for other services by the Lehigh Valley, such as supplying additional motive power to push trains over grades, furnishing coal to Delaware, Susquehanna & Schuylkill locomotives, repairing cars at Perth Amboy and similar incidentals.

36 The contract of January, 1894, remained in force until April, 1904, when it was replaced by another contract, substantially similar in all material respects and providing for the same compensation to the Lehigh Valley and which was to have remained in effect for a period of 15 years. It remained in effect, however, only until 1905, when the Coxe properties were purchased by the Lehigh Valley Railroad.

During the period prior to the absorption of the Delaware, Susquehanna & Schuylkill Railroad by the Lehigh Valley Railroad



Company, L. C. Smith, manager of the Delaware, Susquehanna & Schuylkill Railroad Company, and J. H. Pennington, superintendent of motive power of said railroad, and J. Brinton White, vice president and treasurer of Coxe Brothers & Company, made certain calculations as to the cost of the Delaware, Susquehanna & Schuylkill Railroad of transporting anthracite coal to Perth Amboy, based on various elements of operating expense, including the aforementioned trackage charge of the Lehigh Valley Railroad.

Counsel for complainants has introduced the testimony of these three men relative to the cost of transporting coal from the Lehigh region; and insists that it has an important bearing on the cost of transporting coal from the Wyoming region, for the reason that it has been the custom of the Lehigh Valley Railroad Company to make the same rates from the Wyoming region to Perth Amboy as from the Lehigh region to Perth Amboy; and also because the Wyoming region has the advantage over the Lehigh region, both in distance and in grades.

L. C. Smith, former manager of the Delaware, Susquehanna & Schuylkill Railroad, testified that about 1900, he, as manager of the Delaware, Susquehanna & Schuylkill Railroad, made up a statement of cost to move one train of coal from Drifton, a mine of

37 Coxe Brothers & Company, to Perth Amboy, including trackage to the Lehigh Valley Railroad Company, the shipping charges of that company at Perth Amboy, and the return of empty cars, which statement is filed as Complainants' Exhibit No. 1.

The total cost per ton shown by said exhibit is 76.54 cents.

J. Brinton White, vice president and treasurer of Coxe Brothers & Company, who owned the entire stock of the Delaware, Susquehanna & Schuylkill Railroad Company, made frequent calculations as to the cost per ton of the movement of coal from the mines on the Delaware, Susquehanna & Schuylkill Railroad to Perth Amboy, and continued these calculations until he "got down to a figure which he knew to be correct." The figure which Mr. White arrived at was 76 cents per ton; but as this 76 cents included the trackage charge of the Lehigh Valley Railroad and the shipping charges at Perth Amboy, he was of opinion that the profit of the Lehigh Valley should have been deducted from the 76 cents, if the profit could have been ascertained.

J. H. Pennington was superintendent of motive power of the Delaware, Susquehanna & Schuylkill Railroad Company from 1899 until the latter part of 1905, when that road was bought by the Lehigh Valley Railroad Company, and he made certain tests for the purpose of determining the relative cost of transporting coal from Delaware, Susquehanna & Schuylkill Railroad mines to Perth Amboy in 60,000 and 100,000 pound capacity cars, respectively.

Based upon his tests for the cars of 100,000 pounds capacity (which it is claimed are now in use), counsel for complainants claims to show that the cost of transporting a ton of coal from the mines of the Delaware, Susquehanna & Schuylkill Railroad to and including the dumping of the cars at Perth Amboy, and the return of the

empty cars to the colliery, amounted to 62.41 cents; which  
38 figure includes the profit of the Lehigh Valley Railroad  
Company on its trackage charge and the profit on the shipping  
expense of 12 cents at Perth Amboy.

Counsel for the Lehigh Valley Railroad Company, in his brief, enters upon an exhaustive criticism of Complainants' Exhibit No. 1. Among other things he says:

The exhibit includes no allowance for assembling; it contains no allowance for reserve equipment; it contains no allowance for depreciation; no allowance is made for overtime of crew; no allowance is made for non-revenue haul; no allowance is made for loss and damage or injuries to persons; the item shown for fuel is manifestly inadequate; the wages allowed are inadequate.

He also argues that as the estimate of J. Brinton White confirms that of Mr. Smith, the presumption is that Mr. White omitted the same items that were omitted by Mr. Smith.

As to J. H. Pennington's estimate of the cost per gross ton of transporting coal to Perth Amboy, counsel for the Lehigh Valley Railroad Company says that he admitted that in making the test he purposely left out of account such expenses as would be substantially the same, whether he used 60,000-pound cars or 100,000-pound cars. He did not take into account the following:

- Reserve engines.
- Maintenance and repairs of locomotives.
- Repairs to cars.
- Expenses of telephone and telegraph.
- Stationery.
- Clerks.
- General office expenses.
- Yard expenses.
- Terminal expenses.
- Loss and damage claims.
- Clearing wrecks, etc.

It will be noted that in the calculations made by L. C. Smith and J. Brinton White, one of the most important items was the  
39 trackage charge of 35.94 cents per gross ton, which the Lehigh Valley Railroad Company charged the Delaware, Susquehanna & Schuylkill Railroad for the use of its tracks for the 125-mile haul from Stockton Junction to Perth Amboy.

As it did not clearly appear from the record what the conditions were that led to the trackage arrangement, further testimony was taken upon that point at the supplemental hearing. It was shown that prior to the trackage contract entered into by the Delaware, Susquehanna & Schuylkill Railroad Company with the Lehigh Valley Railroad Company, the coal traffic originating on the Delaware, Susquehanna & Schuylkill Railroad had moved to tide water over the lines of the Philadelphia & Reading Railroad. The following extract from the annual report of the Philadelphia & Reading Railroad Company for the year ended November 30, 1893, was read into the record:

A contract was made with Coxe Brothers & Company, under date of May 14, 1891, for the transportation over the Reading Railroad System of a large tonnage of coal from the mines of that company to New York tidewater and to other markets, the minimum amount to be 1,000,000 tons per annum.

In order to transport the coal to be furnished under this contract, a railroad 10 miles in length was constructed by the Reading Company to connect its lines with those of the Delaware, Susquehanna & Schuylkill Railroad, which was controlled by Coxe Brothers & Company, and a large coal tonnage had passed and was passing over this road; but the division of the freight rate as between the two railroad companies was felt by the receivers to be so inequitable to the Reading Company, as on the greater part of the tonnage it allowed the Delaware, Susquehanna & Schuylkill Railroad Company an average of about 73 cents per ton for gathering the coal, hauling it an average of about 12 miles to Roan Junction, and shipping it at Port Johnston, leaving for the Reading Company

only 80 cents per ton for hauling the coal 168 miles to Bound Brook Junction, that they notified Coxe Brothers & Company that after August 15, 1893, they would no longer transport their coal under that contract, offering, however, to continue to carry the coal upon terms similar to those which are ordinarily accorded to other railroad companies for the exchange of similar business. This offer was, however, not found satisfactory by Coxe Brothers & Company, and the transportation of their coal has, therefore, been almost entirely lost to the Reading Company.

The following extract from the annual report of the Lehigh Valley Railroad Company to its stockholders, for 1894, was also read into the record:

On January 31, 1894, a contract was entered into with the Delaware, Susquehanna & Schuylkill Railroad Company, whereby that company was granted the privilege of running its own trains coal laden to the tidewaters of New York, thus assuring to this company for a term of 15 years from July 1, 1894, an important traffic, that of the Cross Creek Coal Company, formerly Coxe Brothers & Company, for which several outlets existed, and which had been in contention for some time previously. It also removed an incentive for the construction of new lines into the territory tributary to the Lehigh Valley System. Local coal received from the line of that company continues to be hauled in our trains as it was previously.

It appears that, when the contract with the Lehigh Valley Railroad Company was entered into, the Philadelphia & Reading Railroad Company tore up its 10-mile extension which it had built to connect with the Delaware, Susquehanna & Schuylkill, because there was no longer any use for it.

For the purpose of showing the effect of the trackage contract of January, 1894, upon the movement of anthracite coal over the Lehigh Valley Railroad, counsel for that company at the supplemental hearing, put in evidence the following exhibit, viz:

41 *Statement of Anthracite Coal Received from the Delaware, Susquehanna & Schuylkill Railroad During the Fiscal Years Ended November 30.*

Year.	Gross tons.	Year.	Gross tons.
1891.....	233,031	1894.....	976,415
1892.....	199,310	1895.....	1,053,965
1893.....	350,295	1896.....	1,115,077
Total.....	782,636	Total.....	3,145,457

It was also shown that the Central Railroad of New Jersey had a track into Drifton, a point located on the Delaware, Susquehanna & Schuylkill Railroad, and that the Delaware, Susquehanna & Schuylkill Railroad also had a connection with the Pennsylvania at Tomhicken.

Defendant has endeavored to show the actual cost of transporting coal from the Wyoming district to the barges at Perth Amboy. Three civil engineers, William J. Wilgus, J. F. Stevens and John F. Wallace, were engaged by defendant to investigate the transportation of coal from the anthracite region to tidewater for the purpose of ascertaining the cost thereof. They were assisted in their investigation by officers and employees of the road and by engineers in Mr. Wilgus' office. Mr. Wilgus prepared an estimate of the cost of carrying coal based upon theories and formulæ which were approved by the other engineers. His estimate is set forth in a voluminous exhibit known as "Defendant's Exhibit F-3." The exhibit contains all the details from which the final estimate of cost is deduced. The recapitulation of Exhibit F-3 is as follows:

42 *Cost of Transporting Anthracite Coal on the Lehigh Valley Railroad from the Wyoming District to Perth Amboy.*

Items.	Perth Amboy terminal.	Main line, Perth Amboy to Coxton.	Wyoming collection district.	Total.
Operating expenses, including taxes.....	\$0.1189	\$0.6915	\$0.0866	\$0.8970
Interest:				
Roadbed, tracks, and structures.....	.0700	.1470	.0412	.2582
Equipment.....	.0096	.0437	.0253	.0814
General facilities.....	.0012	.0045	.0010	.0067
	.0808	.1952	.0705	.3465
Depreciation:				
Roadbed, tracks, and structures.....	.0071	.0034	.0009	.0114
Equipment.....	.0080	.0046	.0176	.0302
General facilities.....	.0004	.0015	.0003	.0022
	.0155	.0095	.0188	.0438
Total.....	.2152	.9562		1.3473
Additions and betterments.....				.0409
Risks and deficits.....				.1070
Grand total.....				1.4943

There are many circumstances, however, connected with the preparation of this exhibit, which seriously impair its value as evidence on the question of cost.

Mr. Wilgus testified that the figures which he used in preparing said exhibit as to the value of the roadbed, track and structures, and value of equipment, were based on an examination of the road and an examination of the equipment, and that he had attempted to estimate the cost of reproduction. This work, he states, was done by himself and assistants in his employ. The assistant in his employ who undertook to make an examination of the road with a view to determining the cost of reproduction was T. A. Lang and Mr. Wilgus testified that his calculations are absolutely dependent upon the information furnished him by Lang.

The story of Mr. Lang's investigation as to cost of reproduction, as told by Lang himself, was as follows:

43 He left Perth Amboy at 1.20 P. M. on a passenger train for Easton, arriving there about 3.20 or 3.30 P. M. In going to Easton he stood on the rear platform of the train. After arriving at Easton, he did nothing more that day, as it was Sunday. The following morning at 9 A. M. he left Easton on a pony engine, which had a coach on top of the boiler. On this engine he traveled at the rate of 15 or 20 miles an hour, stopping at various points. About 5.30 P. M., of the same day, he arrived at Wilkes-Barre and stayed there all night, all the next day and the next night. While there he made computations in the railroad company's office. On the following day he left Wilkes-Barre at 8.30 A. M. on a passenger train and arrived at Easton about 11 or 12 o'clock. He remained in Easton until that afternoon, and then took a train for New York. While at Easton he devoted a "few minutes" to an examination of the Delaware bridge and the Easton steel viaduct. Based upon this examination, he furnished Mr. Wilgus the data which he required as to estimated cost of reproduction of the Lehigh Valley Railroad.

This examination by Lang was made in the latter part of April, 1909. Mr. Wilgus accepted his estimates, and gave his testimony on April 29, 1909. Mr. Lang, however, was not called as a witness until May 25, 1909. Evidently feeling that his first superficial examination of the road would become the subject of attack, he undertook early in May to make a more thorough examination of the road.

On this second trip he consumed eight and one-half days going over the road on a hand car, and the results of his work on the second trip he terms "his check estimate." The cross-examination of Mr. Lang developed that his check estimate was also a very superficial piece of work. He testified that he "could see" the thickness of the ballast "very easily," and that he measured it "at one place" only; that it was from 18 to 20 inches in thickness. He also  
44 testified that he started out to count the number of switches and frogs, but did not carry it all the way through. He further says that there never had been any examination of the ties and

ballast or going over the road in a hand car at the time that Mr. Wilgus made his estimate.

Based upon information thus furnished, Mr. Wilgus undertook to determine the cost of carrying a ton of coal from the Wyoming district to Perth Amboy, and Messrs. Wallace and Stevens were called as witnesses to confirm the reliability of his figures.

Mr. Wilgus testified that on the trip which he made over the Lehigh Valley Railroad, he started from New York at 6 P. M. in an observation car with Messrs. Wallace and Stevens and certain officials of the Lehigh Valley Railroad Company, and went to Wilkes-Barre. The two following days were spent in riding over the main line of the Lehigh Valley Railroad and some of its branches. It appears never to have been the intention that Messrs. Wilgus, Wallace or Stevens should personally do any of the detail work incidental to the determination of the cost of carrying coal to Perth Amboy. All of that was to be done for them by subordinates, and they were then to testify whether they believed the work of these subordinates constituted a conservative estimate of the cost.

Mr. Stevens testified in substance that he believed it possible for a competent engineer to get a correct approximate idea of the value of a railroad by riding over it, and that he has done considerable work in estimating values by traveling over railroads. He stated that he was not prepared to dispute Mr. Wilgus' figures, and that he would not guarantee them; and "that it would be worse than foolish for him to say that he had time to undertake to make a mile-by-mile estimate of the cost of reproducing the Lehigh Valley Railroad." The most that he had to say concerning Mr. Wilgus' estimate was that it was "probably conservative."

45 Mr. Wallace frankly admitted that his testimony given in corroboration of Mr. Wilgus' figures was a matter of purely personal judgment, based on his experience and observation. He testified that men in his line of business were continually drawing comparisons and making "estimated judgments," and that sometimes they were correct and sometimes wrong. He further stated that it was his custom to value railroad property very much as a farmer would value a horse.

The estimate of cost made by Mr. Wilgus is based on the fundamental assumption that the cost of carrying coal is equal to the average cost of carrying all traffic. If this proposition be sound, it follows that by far the greater part of tariffs covering the transportation of coal are improperly constructed, for the rates upon coal are generally much below the average rates.

Again, as a basis of apportioning expenses for which no actual division could be obtained, the engineers used the relation of passenger-train ton-mileage to freight-train ton-mileage, finding that of the total the former was 7.8 per cent. and the latter 92.2 per cent. This arbitrary basis of apportionment seems to be unwarranted when we take into consideration the relation which exists between freight revenue and passenger-train revenue on the Lehigh Valley Railroad. Those revenues were as follows for the years shown:



	1901.	1905.	1908.	1910.
Total freight revenue.....	\$19,829,363	\$25,962,920	\$30,186,582	\$30,579,597
Passenger-train revenue.....	3,460,528	4,116,847	4,842,652	5,097,118

It thus appears that upon the basis of relative earnings at least 14 per cent. of the value of the road could properly have been assigned to passenger traffic, whereas in the estimate made by Mr. Wilgus but 7.8 per cent. has been so assigned.

Moreover, it will be noted that the estimate of cost shows that the average cost of carrying anthracite coal from the Wyoming  
46 region to Perth Amboy is \$1.49. An exhibit filed by the Lehigh Valley shows that its average receipts per gross ton of anthracite coal to Perth Amboy for the 10 years ending June 30, 1908, were \$1.46. It would therefore follow that all anthracite coal which has been hauled by the Lehigh Valley to tidewater has been carried at a loss of about 3 cents per ton. But it is shown by reports on file with the Commission that the operations of the Lehigh Valley Railroad Company for a number of years past have been exceedingly profitable, and as anthracite coal has constituted almost half of its tonnage, it is fair to assume that it has made a profit upon the handling of that commodity.

There are other matters contained in the record which go to show that the cost of transporting coal as estimated by Mr. Wilgus is excessive.

Henry B. Ely, who was formerly general eastern agent for Coxé Brothers & Company, testified that after the decision in the case of Coxé Brothers & Co. vs. Lehigh Valley Railroad Company, 4 I. C. C. Rep., 535, in 1891, and up to the 31st of January, 1894, the rates paid by Coxé Brothers & Company were the tariff rates of the Lehigh Valley, less a discount of 35 per cent. The tariff rates which were in effect during this period are contained in an exhibit filed by the Lehigh Valley, and deducting said discount therefrom, it appears that the rates actually charged Coxé Brothers & Company were as follows:

	Rate per ton.
For prepared sizes.....	\$1.10½
For pea coal.....	.91
For buckwheat and smaller sizes.....	.78

Defendant has also filed in evidence an exhibit, which shows the adjusted rates to Perth Amboy on the various grades of anthracite coal, by months, during the period from January, 1895, to October, 1900, inclusive, a period of five years and nine months, immediately  
47 preceding the discontinuance of adjustments upon the percentage basis. An average of the rates contained in said exhibit shows the following:

	Rate per ton.
Prepared sizes .....	\$1.4164
Pea coal .....	1.1712
Buckwheat .....	1.1566



These latter figures are of themselves sufficient to show that the estimated cost of carrying coal to tidewater of \$1.49 is far from correct.

A very noticeable feature of the work of these experts employed as disinterested parties to ascertain the cost of carrying coal to Perth Amboy is the manner in which they arrived at their valuations of real estate and rights of way.

Mr. Wilgus testified that he did not himself make the estimates upon the value of the Perth Amboy terminals, but took the estimates of his assistant, Mr. Van Houton. Mr. Van Houton testified that he got his information as to the cost of reproduction of the Perth Amboy terminals from the general solicitor of the defendant, because he is an authority on real estate and handles all the real estate matters for the Lehigh Valley Railroad. Mr. Wilgus also stated that he valued the right of way from Perth Amboy to South Plainfield Junction at \$3,000 an acre, and between Penn Haven and Phillipsburg at \$1,200 an acre, and that these estimates were made "not only upon the way it impressed me, but also from consultation with Mr. Schaperkotter, the general solicitor of the company."

Complainants have called attention to the rates of the Pennsylvania Railroad Company for the transportation of anthracite and the rates of certain bituminous carriers. The Pennsylvania Railroad Company carries anthracite coal from South Wilkes-Barre and Plymouth, in the Wyoming region, to South Amboy, N. J. There

are two routes by which the Pennsylvania may carry this  
48 coal, the longer route being 276 miles and the shorter 222 miles. Owing to the fact that the grades on the long haul

are very much easier than those on the short haul, the long haul is the one generally used. Its rates for this transportation are as follows: Prepared sizes, \$1.40 per gross ton; pea coal, \$1.25 per gross ton; and buckwheat, \$1.15 per gross ton. Up to a comparatively recent date the same rates applied from points on the Delaware, Lackawanna & Western Railroad, which brought the coal to the Pennsylvania Railroad, and the Pennsylvania allowed the Lackawanna a 15-cent lateral charge. The Pennsylvania has since withdrawn the lateral allowance and requires payment to it of its full rate.

The Norfolk & Western Railway Company transports bituminous coal from Pocahontas to Lambert's Point, 377 miles, crossing the Blue Ridge and Allegheny Mountains, at a rate of \$1.40 per gross ton, and this includes the collection of the coal in the Pocahontas district and dumping the same into vessels at Lambert's Point. The rate per ton per mile for this haul is \$0.00377. In the Pocahontas district there are two assembling yards, Bluefield and Vivian, the average distance of the collieries from Bluefield being about 29 miles, and the average distance of the collieries from Vivian about 15 miles. During 1907 the Norfolk & Western collected from the 67 collieries in the district 7,285,360 tons of coal. During the same year the Lehigh Valley collected 4,142,442 tons from the 26 collieries connected with its tracks in the Wyoming region. The following exhibit shows certain rates for the transportation of bituminous coal, together with the length of haul and the rate per ton per mile:

49 *Statement Showing Origin, Destination, Transporting Railroad, Miles Hauled, Rate Charged, and Rate per Ton per Mile on Bituminous Coal Shipments to Tidewater.*

(2,240 Pounds per Ton. Rates Include Dumpage from Piers to Vessels.)

Region or district.	Transporting railroad.	Destination.	Miles hauled.	Rate charged.	Rate in cents per ton per mile.
Myersdale .....	Baltimore & Ohio .....	Baltimore .....	215.0	\$1.18	0.549
Do .....	do .....	Philadelphia .....	310.8	1.25	.402
Do .....	do .....	St. George .....	300.6	1.55	.396
Pocahontas .....	Norfolk & Western .....	Norfolk (Lambert's Point) .....	377.0	1.40	.371
New River Thurmond .....	Chesapeake & Ohio .....	Newport News via Lynchburg .....	418.0	1.40	.335
Do .....	do .....	Newport News via Gordonsville .....	381.0	1.40	.367
Kanawha Handley .....	do .....	Newport News via Lynchburg .....	457.0	1.50	.328
Do .....	do .....	Newport News via Gordonsville .....	420.0	1.50	.357
Kentucky Marrow bone .....	do .....	Newport News via Lynchburg .....	673.0	1.70	.253
Do .....	do .....	Newport News via Gordonsville .....	636.0	1.70	.267
Beech Creek .....	New York Central and Philadelphia & Reading .....	Port Reading .....	308.0	1.55	.503
Do .....	do .....	Philadelphia (Port Richmond) .....	229.0	1.25	.546
Clearfield .....	Pennsylvania R. R. ....	Baltimore (Canton Pier) .....	242.2	1.18	.487
Do .....	do .....	South Amboy .....	322.5	1.55	.481
Do .....	do .....	Philadelphia (Greenwich piers) .....	202.2	1.25	.477
Do .....	do .....	Philadelphia via Lock Haven and Sunbury .....	317.0	1.25	.394

Defendant answers that the tidewater rate of the Pennsylvania Railroad, cited by the complainants, is entirely inconsistent with the other anthracite rates charged by the Pennsylvania, whereas the Lehigh Valley tidewater rate is in line and consistent with its other anthracite rates. An exhibit in this connection shows that the Pennsylvania Railroad Company's rate on prepared sizes to Harrisburg, a distance of 110 miles, is \$1.50; to Philadelphia, a distance of 164 miles, \$1.80; to Reading, a distance of 111 miles, \$1.80; to Perth Amboy, a distance of 226 miles, \$1.80; to South Amboy, when not for transshipment, \$1.80. The Pennsylvania Railroad Company is a bituminous rather than an anthracite road.

50 The defendant also introduced evidence tending to show that the market for anthracite coal on the lines of the Pennsylvania Railroad exhausts the supply originating on the road, and for this reason a 15-cent lateral was allowed on coal assembled on other roads and turned over to the Pennsylvania. On such shipments the Pennsylvania was relieved of the gathering cost; and in view of the high line rates on anthracite coal over the Pennsylvania, the arrangement was favorable to the railroad. As has been noted, the Pennsylvania has since withdrawn the lateral allowance.

In so far as the comparison with bituminous rates is concerned the defendant calls attention to the fact that bituminous rates are generally less than anthracite rates, due in part to the difference in value of the two kinds of coal, and that there are dissimilarities in connection with the carriage and shipment of bituminous and anthracite coal which render the transportation of anthracite coal more expensive. About 95 per cent. of the coal shipped from the bituminous

regions is run of mine and no such elaborate classification is necessary in the assembling regions as in the anthracite region. Bituminous coal is not stored at tidewater and the carriers are therefore relieved of the expense of building storage bins and of placing the coal in the bins and removing it therefrom. It is also claimed that the carriage of bituminous coal involves less empty car mileage, but upon that point the record is rather indefinite. At any rate, the conditions relating to the transportation of anthracite and bituminous coal have not been shown to be similar to such a degree that the existence of a lower rate on bituminous would warrant a conclusion that a higher rate on anthracite on a different road is unreasonable.

It is earnestly contended that any such comparison disregards the fact that the Lehigh Valley Railroad was built and is maintained primarily as a coal-carrying road; that as such it has the right to receive a return upon the coal transported sufficient to enable it to operate profitably, and is further justified in obtaining all traffic that it can secure in addition to its anthracite tonnage at rates which exceed cost of operation; and that a successful search for such outside tonnage, so long as it is carried at a margin of profit above operating expenses, aids the road to perform more cheaply its service in gathering and carrying coal.

Defendant contends that the extraordinary terminal expense attributable to the comparatively short haul on anthracite coal makes any per-ton-per-mile comparison improper and misleading.

In connection with its terminal at Perth Amboy, defendant has erected 372 stocking or storage bins, which vary in capacity from 500 to 1,000 tons each, and have a total capacity of about 250,000 tons. Trestles extend over the stocking bins and coal is dropped into them from cars which have been pushed onto the trestles. Underneath the stocking bins are tunnels through which cars are run to remove the coal as called for. About 350 cars of 60,000 pounds capacity are employed exclusively in removing coal from the bins.

Attention is called by defendant to the special privileges accorded and services rendered in connection with the transportation of anthracite coal without extra compensation above the tidewater rates. The rate covers delivery of coal by the railroad into vessels at Perth Amboy. No demurrage is charged on cars at the collieries or at Perth Amboy. A slight deduction is made from the scale weights at the collieries to offset the weight of water in the coal when loaded, and an allowance is made for depreciation in weight due to re-handling. The shippers have the privilege of stocking in transit. Extensive storage privileges are permitted at Perth Amboy, the railroad providing the bins and performing the labor of storing and lifting from storage without additional compensation. This privilege tends to permit daily operation of mines to the limit of their production regardless of the fluctuation of the market demand. Moreover, the demand for different sizes is more or less irregular, while the production of the several sizes is fairly uniform; and this condition makes the storage privilege of additional value to the shipper at certain seasons of the year. Complainants have freely exercised their privilege of storage. In 1907 they had 47.56 per cent. and in 1908 32.27 per cent. of the coal shipped by them to Perth Amboy placed in the bins. Of the coal

tonnage carried to Perth Amboy in 1908, 20.96 per cent. was placed in the bins.

It is claimed that the limited life of anthracite railroads has an important bearing on the matter of freight rates, and is therefore a factor to be taken into consideration in connection with the question of "fair return".

As to the limited life of the anthracite railroads, counsel for defendant say in their brief:

The evidence establishes the fact that when the railroad shall be deprived of the tonnage from the collieries along its lines, and the incidental tonnage involved in and dependent upon the production of coal, the traffic on the Mahanoy and Hazleton Division and the Blackwood Branch will for all intents and purposes be nil.

As to the Wyoming Division, the investment in everything but the main line will have been destroyed, and the continued existence of the road will depend upon whether or not the through traffic is sufficient to pay the operating expenses and the interest charges.

There are many instances where, on account of closing up breakers for one reason or another, portions of the Lehigh Valley Railroad have already become useless.

They then cite the following instances of abandoned tracks in the Wyoming region, viz:

- Crescent breaker, 1 mile long, abandoned 1900.
- 53     Babylon breaker,  $1\frac{1}{2}$  miles.
- Lawrence track, partially abandoned, length not given.
- Phoenix track, 1 mile long.
- Heidelberg breaker, No. 2, tracks abandoned, length not given.
- Henry breaker, tracks  $1\frac{1}{3}$  miles long, will soon be abandoned.
- Wyoming breaker,  $\frac{1}{4}$  mile long.
- Midvale track,  $\frac{1}{2}$  mile long, abandoned.
- Franklin breaker,  $1\frac{1}{5}$  miles.
- Abbott or Hillman mine,  $\frac{1}{3}$  mile long.
- Mosier mine, track  $1\frac{9}{100}$  miles, abandoned.
- Butler colliery, tracks taken up; length not given.

In addition, it is stated that many collieries have been abandoned which have not involved the taking up of tracks, the tracks remaining in partial use in connection with other breakers.

It will be noted that while the list of abandoned tracks in the Wyoming district has the appearance of being quite large, yet the sum total of such of the mileages as are specified shows that a fraction more than 8 miles have been abandoned.

Counsel also in their brief give quite a list of names of breakers which have been abandoned on the Mahanoy and Hazleton Division; but it is found that the total of abandoned mileage on this division is only 9.5 miles.

As to the kindred subject, namely, the exhaustion of anthracite coal supply, counsel in their brief thus state the result of the testimony of W. F. Dodge, an expert mining engineer, introduced as a witness on behalf of the defendant:

The total future shipments from the Wyoming Division, starting with the year 1909, will amount to 91,230,000 tons. The lives of the various collieries will vary from 5 to 50 years. The

54 annual output is estimated for the first five years to 19,395,000 tons, and will diminish gradually until, from the twenty-fifth to the thirtieth year, the annual output is estimated at only 7,055,000 tons, dwindling down in the period between the forty-fifth and fiftieth years to 50,000 tons per annum. At the end of 25 years, according to the testimony of Mr. Dodge, the output of the Wyoming region will be less than half what it is now, and the end of 50 years will cease altogether.

On the other hand the following more optimistic view of the situation appears from the Report of the Anthracite Coal Strike Commission, rendered to the President of the United States, March 18, 1903, viz:

What is of some importance, however, in connection with the discussion of the past production is a consideration of what is to be expected in the future in the way of production and the probable duration of the anthracite coal supply. The original deposits of the anthracite coal field have been ascertained with a reasonable degree of accuracy.

According to the estimates of the Pennsylvania geological survey the amount of workable anthracite coal originally in the ground was 19,500,000,000 tons. The production to the close of 1901, previously stated, amounted to 1,350,000,000 long tons, which would indicate that there remained still available a total of 18,150,000,000 tons. Unfortunately, however, for every ton of coal mined and marketed one and one-half tons, approximately, are either wasted or left in the ground as pillars for the protection of the workings, so that the actual yield of the beds is only about 40 per cent. of the contents. Upon this basis the exhaustion to date has amounted to 3,375,000,000 tons. Deducting from this the original deposits the amount of anthracite remaining in the ground at the close of 1901 is found to be, approximately, 16,125,000,000. Up

55 the basis of 40 per cent. recovery, this would yield 6,450,000,000 long tons. The total production in 1901 was 60,242,560 long tons. If this rate of production were to continue steadily, the fields would become exhausted in just about one hundred years.

Mr. William Griffith, in a series of articles contributed to the Bond Record in 1896, considers that the estimates upon which the foregoing computations have been made were too liberal. His estimate of the amount of minable coal remaining at the close of 1896 was 5,073,786,750 tons.

In the six years from 1896 to 1901, inclusive, the production has been, approximately, 308,570,000 tons, which would leave still available for mining 4,765,216,750 tons. This supply, at the rate of production in 1901, would last a little less than 80 years. But indicating how susceptible to error are human predictions, it is worth to state that in his carefully prepared statement, published in 1896, Mr. Griffith assumes the limit of annual production would be reached in 1906 and would amount in that year to 60,000,000 tons.

This amount of production was reached in 1901, in just half the time predicted by Mr. Griffith, and the production of January, 1902, as recently reported, shows that the anthracite mines are capable of producing at a rate of 72,000,000 tons annually in their present state.

of development. It is not to be supposed, however, that the annual rate of anthracite production will continue practically uniform until the mines are exhausted and then suddenly cease. Portions of the fields have already been worked out, others are rapidly approaching total exhaustion, while others at the present rate of production will, it is calculated, last from 700 to 800 years. If we can assume the annual production will have reached its maximum limit at 56 between 60,000,000 and 75,000,000 tons, and that the production will then fall off gradually as it increased, we may expect anthracite mining to continue for a period of from 200 to 250 years. (Report of Anthracite Coal Strike Commission, pp.21,22.)

Defendant claims the right to earn enough out of its coal rates to provide for a return of the principal of the investment in that part of the railroad company devoted to the carriage of coal, when and as this principal becomes reduced and extinguished by exhaustion of the coal. We have noted the estimate of defendant's witnesses to the effect that shipments of anthracite coal over the railroad will practically cease in 50 years, and we have quoted the opinion expressed on the same subject by the Anthracite Coal Strike Commission to the effect that production may last for 250 years. Probably the truth lies somewhere between the two extremes. During the years 1903 to 1910, the Lehigh Valley Railroad Company under the rates in controversy succeeded in accumulating an unappropriated surplus of \$27,219,780. If the company could accumulate this sum for every eight-year period during the next 30 or 40 years, it would have a surplus in the neighborhood of \$125,000,000. It seems, therefore, that the present rates are more than sufficient to meet defendant's idea of an annual income sufficient to provide for return of the capital when that part of the railroad devoted to the carriage of anthracite coal loses its earning capacity through the exhaustion of that commodity. This matter, however, is too speculative to be of much value in determining the reasonableness of present rates. By the time anthracite coal is exhausted other traffic may have become so dense that the present value of the road will not be impaired.

It requires no extended argument to sustain the proposition that the maintenance of an unreasonably high rate operates to the advantage of the Lehigh Valley Railroad Company as a dealer 57 in coal. The record shows that the only line of demarcation between the Lehigh Valley Railroad Company and the Lehigh Valley Coal Company is one of bookkeeping. Assuming for purposes of illustration that the cost of mining anthracite coal is \$2 per ton and the cost of carrying it to tidewater is \$1 per ton, it follows that the cost of coal at tidewater would be \$3 per ton; and if the published rate were \$1 the independent operator and the railroad coal company would be on a fair competitive basis so far as the cost of mining and transportation are concerned. But as between the railroad company and its coal company it matters not whether the profit comes from mining or transporting the coal. So, therefore, if, instead of the \$1 rate above mentioned, the railroad company were to establish a rate of \$1.50 per ton, the railroad and its coal company could still sell coal at tidewater for \$3 per ton,



standing a deficit of 50 cents per ton in the mining price and taking an equal profit in the transportation price. But the independent operator cannot recoup himself in this manner, and the best price that he could make at tidewater would necessarily be the mining price of \$2, plus the carrying charge of \$1.50, or \$3.50; and he would enter the market at a disadvantage of 50 cents per ton as compared with the railroad and its coal company. It is obvious that such an advantage would enable the railroad company and its alter ego, the coal company, to monopolize the field of production and the selling market. Whatever the means employed, it is a fact that the railroad coal company has monopolized the coal field served by it. In 1901, 47 per cent. of the defendant's coal tonnage to Perth Amboy was controlled by it and 53 per cent. by independent operators; while in 1908 the defendant controlled 95 per cent. of the anthracite tonnage over defendant's line to Perth Amboy and the independent operators 5 per cent. During the same period complainants' shipments to Perth Amboy decreased from 147,811 tons for 1901 to 40,562 tons for 1908.

Coming now to the question of the reasonableness of the rates, counsel for defendants asserts that the rates on coal must be sufficient to produce four results, viz: (1) An income sufficient to make up for past deficiencies in current return on investment. (2) A reasonable current annual return upon the investment in the railroad and transportation adjuncts. (3) An amount sufficient to provide reasonably for keeping the property up to constantly modern standards—i. e., such improvements as are necessary for public convenience and safety and to enable the railroad to get business in competition with other roads. (4) An amount sufficient to provide for a return of the principal of the investment, when and as this principal becomes reduced and extinguished by the exhaustion of coal freight.

Under the first proposition defendant argues that the present rates should be sufficiently high to enable it now to earn the amount by which it has fallen short of paying a 6 per cent. annual dividend in the past, or at least as far back as 1894. It shows that a dividend rate of 6 per cent. applied to its common stock of \$40,441,100 for the period from November 30, 1894, to June 30, 1908, would amount to \$35,091,276; that during this period the dividends paid amounted to \$7,260,264; and argues that upon a 6-per-cent basis the common-stock shareholders suffered a deficiency in dividends during this 14½-year period of \$27,831,112. In the Wilgus estimate above mentioned 10 cents per ton is added to the assumed cost of carrying coal to Perth Amboy for the purpose of "making good the deficit of over \$20,000,000 in dividends" for past years.

Assuming, without conceding, that the present producers and consumers of anthracite coal must bear the burden of the misfortunes or mismanagement of a previous generation, it is worth while to inquire whether this claim does not amount for the most part to a declaration, not that the shareholder is entitled to a fair dividend, but rather to an assertion that he may invest his dividends in improvement of the property and have it in cash also.

Certain aspects of the financial condition of the Lehigh Valley for the years 1901 to 1910, inclusive, are set forth in the following table:



Year ending June 30—

Item	1901	1902	1903	1904	1905	1906	1907	1908	1909	1910
<b>Sec. A. MILEAGE:</b>										
1. Owned—single track, miles	317.67	317.09	316.98	311.63	308.12	306.70	302.30	302.39	303.00	302.61
2. Owned—all tracks, miles	797.17	799.69	797.84	799.69	802.09	816.42	832.66	832.99	840.86	840.86
3. Operated—single track, miles	1,387.36	1,387.24	1,382.15	1,392.67	1,393.87	1,429.16	1,443.24	1,447.68	1,445.67	1,440.25
4. Operated—all tracks, miles	2,905.48	2,923.31	2,983.68	2,971.87	3,003.30	3,103.48	3,163.30	3,228.49	3,241.48	3,231.43
<b>Sec. B. COST OF ROAD AND EQUIPMENT</b>										
Per mile owned—single track	\$37,557.712	\$37,557.712	\$46,435.550	\$46,435.550	\$48,410.162	\$48,410.162	\$54,365.714	\$58,782.936	\$58,782.936	\$61,443.218
Per mile owned—all tracks	119,543	119,760	146,468	149,098	157,115	167,842	178,440	194,390	194,390	203,044
Per mile operated—single track	47,289	47,090	58,201	58,067	60,345	68,319	73,571	79,517	79,517	82,043
<b>Sec. C. TOTAL CAPITALIZATION</b>										
Per mile owned—single track	\$7,415.100	\$7,900.100	\$9,650.072	\$9,267.100	\$9,984.100	\$10,352.100	\$10,644.100	\$12,338.941	\$12,940.047	\$12,940.047
Per mile owned—all tracks	27,378.179	27,777.268	33,907.274	33,831.262	34,868.468	36,559.468	37,919.468	43,757.543	42,728.949	41,972.938
Capital stock	40,441.100	40,441.100	40,441.100	40,441.100	40,441.100	40,441.100	40,441.100	40,441.100	40,441.100	40,441.100
Funded debt	47,459.000	47,459.000	67,114.000	66,826.000	58,545.000	80,541.000	89,203.000	91,897.881	89,045.947	86,575.947
<b>Sec. D. TOTAL OPERATING REVENUES</b>										
Per mile operated—single track	23,654.215	23,668.672	25,692.270	28,672.362	30,235.346	32,150.167	35,287.581	37,436.745	34,949.653	38,151.174
Per mile operated—all tracks	17,049	17,062	18,455	20,588	21,692	23,495	24,460	26,854	24,176	26,459
Total operating expenses	8,141	8,097	8,683	9,648	10,067	10,228	11,155	11,593	10,782	11,696
Per mile operated—single track	18,676.927	19,103.254	18,377.922	18,255.917	18,445.230	19,692.035	21,700.358	24,012.038	22,641.145	23,814.256
Per mile operated—all tracks	13,462	13,771	13,201	13,109	13,223	13,772	15,096	16,587	16,592	16,836
Ratio to total operating revenues, per cent.	6.428	6.535	6,222	6,143	5,142	6,281	6,690	7,438	6,864	7,302
<b>Analysis of operating expenses under official classification:</b>										
Maintenance of way and structures	78.96	80.71	71.53	63.67	61.01	61.41	61.50	64.16	64.50	62.42
Per mile operated—single track	4,241,717	4,682,997	4,099,169	3,658,204	3,265,583	3,153,245	3,196,354	3,386,642	3,273,329	3,462,903
Per mile operated—all tracks	3,057	3,340	2,944	2,196	2,346	2,206	2,215	2,348	2,264	2,404
Ratio to total operating revenues, per cent.	1.460	1.585	1.388	1,029	1,089	1,006	1,011	1,063	1,010	1,062
<b>Maintenance of equipment:</b>										
Per mile operated—single track	17.93	19.56	18.46	16.67	10.82	9.83	9.06	9.06	9.37	9.06
Per mile operated—all tracks	4,448,244	5,149,924	4,654,306	4,744,232	4,894,269	6,485,794	6,186,542	6,163,874	5,862,430	5,966,810
Ratio to total operating revenues, per cent.	3.206	3.712	3,872	3,407	3,511	3,808	4,287	4,261	4,034	4,163
Per mile operated—single track	1,531	1,762	1,589	1,696	1,630	1,751	1,866	1,906	1,799	1,836
Ratio to total operating revenues, per cent.	13.81	21.76	18.27	16.54	16.19	17.13	17.54	16.44	16.62	16.71

## LEHIGH VALLEY RAILROAD COMPANY.—CONTINUED.

Item	Year ending June 30—									
	1901	1902	1903	1904	1905	1906	1907	1908	1909	1910
Traffic and transportation expenses—										
Per mile operated—single track	9,251,820	8,581,666	8,964,825	9,857,585	9,694,567	10,421,778	11,686,787	12,121,580	10,760,203	11,512,285
Per mile operated—all tracks	6,669	6,186	6,440	7,078	6,955	7,292	8,056	8,373	7,443	7,993
Ratio to total operating revenues, per cent	3.184	2,985	3,085	3,217	2,228	3,326	3,694	3,765	3,320	3,530
General expenses—										
Per mile operated—single track	39.11	36.25	34.39	34.38	32.06	32.52	33.12	32.39	30.79	30.17
Per mile operated—all tracks	735.146	738.667	618.533	685.895	587.011	621.218	630.075	637.940	709.704	713.119
Ratio to total operating revenues, per cent	530	533	445	428	421	436	435	441	451	495
Analysis of operating expenses between labor and other expenses:										
Compensation paid direct to labor	253	253	210	201	195	196	199	196	219	219
Ratio to total operating revenues, per cent	3.11	3.12	2.41	2.08	1.94	1.94	1.78	1.71	2.03	1.87
Compensation paid direct to officers:										
Per mile operated—single track	9,193,572	8,995,715	10,550,679	10,977,294	10,920,360	12,013,758	14,282,297	12,891,828	42,113,151	13,703,030
Per mile operated—all tracks	6,631	7,205	7,579	7,882	7,894	8,406	9,896	8,905	8,379	9,514
Ratio to total operating revenues, per cent	3.166	3,419	3,572	3,694	3,636	2,834	4,515	3,993	3,737	4,202
Compensation paid general officers	38.89	42.23	41.37	38.29	36.12	37.49	40.48	34.44	34.66	35.92
Per mile operated—single track	139,352	128,320	145,835	116,746	103,188	104,576	129,718	178,063	484,768	160,821
Per mile operated—all tracks	100	83	105	84	74	73	90	123	128	112
Ratio to total operating revenues, per cent	48	44	49	39	34	33	41	56	57	49
Material, fuel, and all other items										
Per mile operated—single track	59	54	56	40	34	32	37	49	53	42
Per mile operated—all tracks	9,338,003	8,979,219	7,681,408	7,161,877	7,421,682	7,563,705	7,288,343	10,942,147	10,243,226	9,860,405
Ratio to total operating revenues, per cent	6,731	6,473	5,517	5,143	5,325	5,293	5,050	7,559	7,085	6,909
	3,214	3,072	2,601	2,410	2,472	2,414	2,304	3,389	3,160	3,051
	39.48	37.94	39.90	24.96	24.55	23.60	20.65	29.23	29.31	26.06

## LEHIGH VALLEY RAILROAD COMPANY.—CONTINUED.

Year ending June 30—

Item	1901	1902	1903	1904	1905	1906	1907	1908	1909	1910
<b>Sec.D. TOTAL OPERATING REVENUES—</b>										
Continued.										
Taxes	\$312,182	\$285,781	\$290,995	\$471,262	\$538,833	\$468,849	\$590,501	\$850,361	\$780,404	\$794,998
Per mile owned—single track	983	901	915	1,512	1,749	1,529	2,185	2,812	2,575	2,627
Per mile owned—all tracks	392	358	364	589	672	575	801	1,020	937	946
Per mile operated—single track	225	206	208	338	387	328	458	568	540	552
Per mile operated—all tracks	107	96	98	159	179	160	209	263	241	244
Ratio to total operating revenues..... per cent.	1.31	1.21	1.13	1.65	1.78	1.47	1.87	2.27	2.23	2.09
Operating income	4,665,116	4,279,637	7,024,352	9,945,183	11,251,182	11,899,303	12,926,522	12,564,346	11,628,314	13,541,920
Per mile operated—single track	3,362	3,085	5,046	7,141	8,072	8,326	8,956	8,679	8,044	9,402
Per mile operated—all tracks	1,696	1,464	2,378	3,346	3,746	3,797	4,096	3,892	3,587	4,152
Ratio to total operating revenues..... per cent.	19.73	18.08	27.34	34.68	37.21	37.12	36.53	33.57	33.27	35.49
<b>SEC. E. INCOME ACCOUNT:</b>										
Operating income from rail-road operation	4,665,106	4,279,637	7,024,352	9,945,183	11,251,182	11,899,303	12,926,522	12,564,346	11,628,314	13,541,920
Additions to income: (total of items 1 and 2 following)	1,286,836	1,367,808	1,660,528	1,682,763	1,493,508	1,548,521	1,726,188	1,474,833	1,067,273	1,463,372
1. Rents received from other roads for the use of road, equipment, and facilities of the operating property										
2. Interest on bonds and dividends on stocks in separately operated railroads and income from other miscellaneous property	718,006	621,011	962,233	1,209,376	1,040,498	739,670	781,050	{ 509,581 } { 108,331 }	292,630	409,013
	568,738	746,797	698,296	473,387	453,010	808,851	945,138	856,921	764,643	1,064,359

## LEHIGH VALLEY RAILROAD COMPANY.—CONTINUED.

Item	Year ending June 30—										
	1901	1902	1903	1904	1905	1906	1907	1908	1909	1910	
Deductions from income: (total of items 1, 2, and 3 fol- lowing).....	7,091,757	6,980,222	6,307,633	5,907,095	5,940,251	6,426,014	6,559,167	6,006,532	6,841,783	6,867,892	
1. Rents paid for lease of roads which form a part of the operating property.....											
2. Rents paid to other roads for the partial use of road equip- ment, and facilities needed in operating the property.....	2,724,019	2,743,965	2,727,226	2,332,434	2,410,967	2,455,296	2,347,253	2,530,523	2,748,308	2,763,893	
3. Interest accrued on funded and floating debt.....	706,919	536,293	562,258	574,384	444,471	430,176	373,895	185,833	150,806	173,270	
	3,660,819	3,709,964	3,018,147	3,000,277	3,084,813	3,540,552	3,838,019	3,940,176	3,942,669	3,930,729	
Corporate income for the year	Def. 1,139,815	Def. 1,332,777	2,377,247	5,720,651	6,804,459	7,021,810	8,093,543	7,432,647	5,843,804	8,137,400	
Per cent on capital stock outstanding sec. C.	2.82	3.29	5.86	14.14	16.82	17.36	20.01	18.38	14.45	20.12	
SEC. F. PROFIT AND LOSS ACCOUNT:											
Accumulated surplus brought forward from preceding year.....	77,014	Def. 1,176,238	Def. 3,372,147	1,620,681	5,914,796	8,657,325	11,380,915	14,009,283	16,516,904	19,212,262	
Corporate income for the year	Def. 1,139,815	Def. 1,332,777	2,377,247	5,720,651	6,804,459	7,021,810	8,093,543	7,432,647	5,843,804	8,137,400	
Discounts on securities bought and sold and other profit and loss allocations.....	-290,195	-861,112	+3,881,763	+38,554	-1,424,371	-1,103,971	-1,252,541	-719,069	-135,110	-397,617	
Total surplus available for dis- tribution.....	Def. 1,361,996	Def. 3,372,147	2,586,853	7,390,066	11,294,864	14,576,164	18,221,917	20,722,871	22,225,598	26,958,035	
Per cent. on capital stock outstanding sec. C.	3.37	8.34	7.14	18.25	27.53	36.04	45.06	51.24	54.96	66.66	
Dividends declared					1,225,989	1,624,022	2,144,044	2,430,703	2,430,703	2,430,703	
Additions, betterments, and permanent improvement appropriations.....					1,411,550	1,570,227	2,008,590	1,903,834	580,206	843,877	
Sinking and special reserve funds.....											
Total surplus appropriated	Cr. 183,728		1,266,182	1,405,290	2,637,539	3,194,249	4,212,134	4,114,430	2,487	Cr. 95,547	
Per cent. on capital stock outstanding sec. C.	45		3.13	3.62	6.62	7.90	10.42	10.40	7.45	65	
Unappropriated surplus carried over to the following year.....	Def. 1,176,256	Def. 3,372,147	1,620,681	5,914,796	8,657,325	11,380,915	14,009,283	16,516,904	19,212,252	27,219,750	

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The figures for years prior to 1901 are not given above because we have not had them revised to conform to the present system of accounting; but from 1895 onward they tell practically the same story—that is, the charges to maintenance of way from 1895 to 1904 were abnormal as compared with the years 1905 to 1910. During this 10-year period the density of tonnage per mile of line has increased about 30 per cent. Three of the large items of operating expenses, namely, maintenance of equipment; compensation to labor; and material, fuel and supplies, show an increase somewhat proportionate to the increase in density of tonnage; while the fourth large item of operating expense, maintenance of way and structures, has decreased from \$3,057 per mile in 1901 and \$3,340 in 1902 to \$2,404 in 1910. The only inference which can be drawn from these figures is that in the period from 1895 to 1902 the shareholders elected to devote surplus earnings to rebuilding and improving their road instead of distributing the earnings to themselves in the form of dividends. The excess of the maintenance of way item alone for several years prior to 1903 over that for 1910 was sufficient to pay a 2-per-cent. dividend on the stock. The devotion of earnings to permanent improvements and betterments was no doubt a wise policy on the part of those in control of the road. But the indications are that the shareholders have already received the benefit of that policy, even though it has not come in the form of cash dividends covering the period in question. From 1894 to 1903 the average market value of Lehigh Valley Railroad stock was in the neighborhood of \$75 per share. At this writing the same stock is quoted at \$178. Thus a person who had invested in Lehigh Valley at par prior to 1904, has benefited by an appreciation in value of his stock to the amount of 5 per cent. per annum since 1894 and has received dividends gradually increased from 2 per cent.

to 5 per cent. since 1905. The earnings in 1910 were sufficient to pay a dividend of 20.12 per cent., but the company elected to increase its unappropriated surplus from \$19,212,252 in 1909 to \$27,219,890 in 1910. Moreover, the Lehigh Valley Railroad Company has been carrying amongst its assets certificates of indebtedness of the Lehigh Valley Coal Company amounting to \$10,537,000, upon which no interest is collected. Interest on this indebtedness would be sufficient to pay a 1-per-cent. dividend on the stock. We should hesitate to assent to defendant's first proposition that present shippers must bear the burden of earlier misfortunes of the road, but it is unnecessary to decide that point in this case because it has been sufficiently demonstrated that the shareholders have received a fair return on their investment, taking into consideration the money actually received in dividends, the increased value of their shares, the increased value of the property, and the large unappropriated surplus. It follows therefore that the allowance in the Wilgus estimate of 10 cents per ton to make up for this alleged deficit should be eliminated from the calculation.

Defendant's second and third contentions that the rates should be sufficient to guarantee a fair annual return on the investment and to provide reasonably for keeping the property up to improved mod-

ern methods are sound but have little bearing on this case, in view of the summary of the road's finances above set forth. It will be noted by referring to that tabulation that defendant's corporate income was sufficient to pay a dividend on the capital stock of 16 per cent. in 1905, 17 per cent. in 1906, 20 per cent. in 1907, 18 per cent. in 1908, 14 per cent. in 1909, and 20 per cent. in 1910. Instead of paying such dividends it has paid 5 per cent. on its capital stock, appropriated to additions, betterments and improvements sums ranging from \$580,206 to \$2,068,590 per annum, and has increased its unappropriated surplus from nothing in 1902 to \$27,219.65 780 in 1910. Certainly it must be conceded that the present rates provide liberally for a fair annual return on the investment and the proper maintenance of the property.

As noted, the Lehigh Valley Railroad Company carries amongst its assets \$10,537,000 non-interest bearing certificates of indebtedness of the Lehigh Valley Coal Company. At 5 per cent. per annum the interest on these certificates would be \$526,850. The latter sum is in all substantial respects a rebate to the Lehigh Valley Coal Company. The proportion of the total tonnage from the anthracite field shipped by the Lehigh Valley Coal Company does not appear, but it is of record that it ships about 95 per cent. of the coal to tidewater. If its proportion of the total traffic is the same as that to tidewater, its tonnage for 1910 was in the neighborhood of 10,500,000 tons; and the net result of the transportation as between it and its competitors was the same as if it had had its coal transported for 5 cents per ton less than the independent dealers. Referring to the same matter in *Coxe Brothers Co. v. L. V. R. R. Co.*, supra, the Commission said:

The railroad company advances to the coal company nearly \$7,000,000 with which to transact its business, and for the use of which the railroad company receives no advantage other than such advantages as it gets from carrying the freight of the coal company. The value of the annual use of such advances at 5 per cent. interest amounts to \$350,000, nearly. This sum exceeds 10 cents per ton on all the coal shipped by the coal company over the lines of the railroad company, and is to that extent an undue preference given to said coal company, to the disadvantage of Coxe Brothers & Company and other shippers who receive no advances. The advantage of like advances if made to complainants, estimated on their annual 66 shipments, would exceed \$100,000. Had the Lehigh Valley road as a means of securing freight made like advances to any other competitor of complainants, whether an individual operator or a coal company in which the railroad company had no interest, it would hardly be contented that such act did not amount to undue preference and unjust discrimination. The fact that the road was interested in the coal company, as the owner of its capital stock does not make lawful what would be unlawful without such interest.

Defendant has filed an exhibit purporting to show that its average revenue for the transportation of coal to Perth Amboy from 1898 to 1908 has been \$1.46 per gross ton. Assuming that by the loan to the coal company defendant loses interest charges amounting roughly to 5 cents per ton, the average just given would be reduced to \$1.41

per gross ton. In the Coxe Brothers case, decided in 1891, the Commission decided that a fair return to defendant upon traffic here involved would be an average of \$1.40 per gross ton. The rates ordered as a result of that decision were never put in force because, while litigation resulting therefrom was in the courts, it was decided that as the law then stood the Commission was without authority to fix a rate for the future. Since that decision density of tonnage has increased, the ratio of operating expenses to income has materially decreased, grades have been eliminated, train loads and car capacities have materially increased; in short, every factor which ought to make for lower rates has been present. But the rates charged have produced revenue of about 6 cents per ton in excess of that found reasonable by the Commission.

Turning again to the Wilgus exhibit, we find the estimated cost of transporting a ton of coal from the Wyoming region to Perth Amboy is \$1.49. But we have shown that 10 cents of that

67 amount, designed to cover past deficits, is an improper charge.

Therefore \$1.39 would be the cost if the exhibit were accurately and properly constructed on the basis of facts known to the witnesses. In considering this exhibit it must be remembered that the so-called cost does not mean operating expense. The item of \$1.49 is designed to cover all proper, possible, and probable charges, including not only interest and depreciation charges, but other items, such as the 10-cent allowance above mentioned. Therefore, if the exhibit were not open to objection, it would be seen that, after eliminating the 10-cent charge above referred to, defendant's rates on the several sizes of anthracite coal ought to bring them revenue averaging \$1.39 per gross ton. That is to say upon defendant's own showing it is collecting rates which have been on the average 7 cents per ton in excess of a reasonable rate.

After a careful study of defendant's exhibits relating to tonnage and cost of movement, as well a painstaking analysis of defendant's voluminous exhibits respecting its past and present financial condition, we are of opinion and so find that defendant's rates for the transportation of coal from the Wyoming region to Perth Amboy of 1.55 per gross ton on prepared sizes, \$1.40 on pea coal, and \$1.20 on buckwheat coal, are unreasonable so far as they exceed \$1.40 on prepared sizes, \$1.30 on pea coal, and \$1.15 on buckwheat. If the relative tonnage of the several sizes continues as it has in the past, the rates herein found to be reasonable would result in an average reduction in defendant's revenue per gross ton for hauling coal to Perth Amboy of about 11 cents below the figure of \$1.46 for the ten years from 1898 to 1908. As applied to 1908 the last year for which anthracite tonnage to Perth Amboy is shown in the record, the proposed rates would have resulted in reducing its operating revenue by

68 about \$247,000 and apparently 95 per cent. of this amount would accrue to the benefit of the railroad coal company. By reference to the table above set forth it is at once apparent that such a reduction will have no serious effect on defendant's revenues and will afford ample allowance for interest charges, operation, dividends, and all proper reserve funds.

We are further of opinion that reparation should be awarded upon



basis of the rates herein found to be reasonable upon all shipments of coal by complainants from the Wyoming region to Perth Amboy since August 1, 1901. The amount of reparation which should be awarded under our finding in this case can not be ascertained from the exhibits now on file, and such further proceeding will be had as may be necessary to determine the amount of money due to complainants.

*Order.*

At a General Session of the Interstate Commerce Commission Held at Its Office, in Washington, D. C., on the 8th Day of June, A. D. 1911.

*Present:*

Judson C. Clements, Charles A. Prouty, Franklin K. Lane, Edgar E. Clark, James S. Harlan, Charles C. McChord, Balthasar H. Meyer, Commissioners.

No. 1180.

HENRY E. MEEKER and CAROLINE H. MEEKER, Co-partners, Trading as Meeker & Company,

v.

LEHIGH VALLEY RAILROAD COMPANY.

69 This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered, That defendant Lehigh Valley Railroad Company be, and it is hereby notified and required to cease and desist, on or before the 15th day of August, 1911, and for a period of two years thereafter to abstain from charging, demanding, collecting or receiving its present rates for the transportation of anthracite coal in carloads from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., as follows, to wit: upon prepared sizes \$1.55 per gross ton; on pea coal \$1.40 per gross ton; and on buckwheat coal \$1.20 per gross ton; which said rates have been found by the Commission in its said report to be unreasonable.

It is further ordered, That said defendant be, and it is hereby notified and required to establish, on or before the 15th day of August, 1911, and for a period of two years thereafter to maintain, and apply to the transportation of anthracite coal in carloads from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., rates not in excess of the following, to wit: \$1.40 per gross ton on prepared sizes of said coal; \$1.30 per gross ton on pea coal; and \$1.15 per gross ton on buckwheat coal; which said rates have been found by the Commission in its said report to be reasonable.

*Order of Court.*

Filed Sept. 3, 1912.

70 And now, Sept. 3, 1912, the petition of Henry E. Meeker, in the above proceeding having been filed and the averments thereof considered, it is ordered that the Lehigh Valley Railroad Company be and it is hereby directed and ruled to file a plea, answer or demurrer to said petition within twenty days of the service of a copy of said petition, together with a copy of this Order, or judgment sec. leg.

J. W. THOMPSON, *Judge.**Plea.*

Filed Oct. 5, 1912.

To the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania:

The defendant, the Lehigh Valley Railroad Company, for a plea in the above stated case pleads Not Guilty; and further pleads the bar of the Statutes of Limitation applicable to the plaintiff's claim; and for further plea in this behalf defendant avers that the Interstate Commerce Commission has no jurisdiction to make the findings and order of reparation which the plaintiff seeks to enforce by this proceeding, and further that there was before the Commission no substantial evidence to sustain said findings and said order.

E. H. BOLES,  
*Solicitor for Defendant.*

143 Liberty Street, Borough of Manhattan, New York City.

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*Jury.*

And afterwards, to wit, on the twelfth day of November, 1912, a jury being called, comes, to wit:

Henry H. Gilbert  
John H. Schwartz  
J. H. Lits  
W. G. Grosseup  
J. M. Moser  
John S. HoffJohn B. Stroh  
Clement H. Koons  
John W. Thompson  
Arthur E. Richards  
Louis Alexander  
George W. Seaborn

who were respectively sworn or affirmed to try the issue joined.

*Verdict.*

And afterwards, to wit, on the 12th day of November, 1912, the jurors aforesaid, upon their oaths and affirmations, respectively do

say that they find for plaintiff and assess the damages in the sum of Thirteen Thousand, One Hundred Sixty-one and 78-100 (\$13,161.78) Dollars.

*Bill of Exceptions.*

Be it remembered that at said September Sessions came the said plaintiff into the said Court and impleaded the said defendant in a certain plea of trespass, etc., in which the said plaintiff declared prout narr and the said defendant pleaded "not guilty." And thereupon issue was joined between them.

And afterwards, to wit, at a session of the said Court held in the District aforesaid, before the Honorable James B. Holland, Judge of the said Court, on the twelfth day of November, 1912, the aforesaid issue between the said parties came to be tried by a jury of said

72 District for that purpose duly impaneled prout list of jurors at which date came as well the said plaintiff as the said defendant, by their respective attorneys; and the jurors of the jury aforesaid impaneled to try the said issue being also called, came and were then and there in due manner chosen and sworn or affirmed to try the said issue, and upon the trial the counsel of the said plaintiff and defendant respectively offered evidence as follows

Before Hon. James B. Holland, J., and a Jury.

PHILADELPHIA, PA., TUESDAY, November 12, 1912.

Present:

William A. Glasgow, Esq., and  
John Henry Hall, Esq., representing the plaintiff.  
Edward H. Boles, Esq.,  
Everett Warren, Esq.,  
Frank H. Platt, Esq., and  
George W. Field, Esq., representing the defendant.

Jury sworn or affirmed November 12, 1912.

*Evidence on Behalf of the Plaintiff.*

HENRY EUGENE MEEKER, having been duly sworn, was examined as follows:

By Mr. GLASGOW:

Q. You are the plaintiff in this case?

A. Yes.

Q. Did you file a complaint before the Interstate Commerce Commission in 1910?

73 A. Yes.

Q. Setting up the complaint as to unreasonable rates from July 17, 1907, to the date of the filing of the complaint?

A. Yes.

Q. What was your business during that time?

A. I was buying and selling coal.

Q. Where was your office?

A. In New York City.

Q. How long had you and your father before you been in business of that kind?

A. For forty years; that is, my father before me.

Q. During that period from July 17, 1907, had you bought any coal in the Wyoming Region of Pennsylvania?

A. Yes.

Q. Particularly, what coal did you buy?

A. I bought mostly from the Stevens Coal Co.

Q. Did you ship any of that coal, from the period of July 17, 1907, to the date of the filing of the complaint before the Interstate Commerce Commission, to Perth Amboy?

Mr. FIELD: I might raise the objection here, in order to make it clear from the outset, that the period which Mr. Glasgow's questions are covering is from July 17, 1907, to April 13, 1910. The Commission specifically disallows claims arising from shipments between July 17, 1907, and two years before the date of the filing of the complaint in 1910, so that the questions now directed to the witness go back eight months beyond the date which the Commission allowed. I suggest that the questions be restricted to the subject matter of this action.

Mr. GLASGOW: If the gentleman will just permit me a moment, I was coming to the limitation which the Commission put upon the order, and I will do so now.

74 By Mr. GLASGOW:

Q. Then your complaint was filed on the 13th of April, 1910, was it not?

A. Yes, sir.

Q. And were you, for two years prior to that date, shipping coal over the Lehigh Valley Railroad from the Wyoming Region to Perth Amboy?

A. Yes.

Q. That goes back to the 13th of April, 1908?

A. Yes.

Q. Can you tell us what amount of coal of different sizes you shipped between the 13th of April, 1908, and the 13th day of April, 1910?

A. I cannot without making up the figures from this statement.

Q. It occurs in this Report. You can read it from the Report, if you wish.

A. 46,772.02 tons of prepared sizes; 26,972.06 tons of pea coal and 22,004.09 tons of buckwheat coal.

Q. Did you pay the freight on those tonnages shipped by you during that period?

A. Yes.

Q. At what rates did you pay?

A. At \$1.55 for prepared coal; that is, broken, egg, stove and chestnut.

Q. Prepared sizes?

A. Prepared sizes; \$1.40 for pea and \$1.20 for buckwheat.

Q. Your complaint before the Commission, as I understand, was that during that period from April 13, 1908, for two years, the rates were unjust and unreasonable?

A. Yes.

Q. Was a hearing had by the Commission on that question?

A. Yes.

Mr. FIELD: We object to that as a conclusion of the witness, whether the hearing was had on that question or not.

Mr. GLASGOW: It is merely introductory.

The COURT: You object to the question as to whether a hearing was had?

Mr. FIELD: I withdraw the objection. Mr. Glasgow states it is merely introductory.

By Mr. GLASGOW:

Q. I ask you if this is a report of the Interstate Commerce Commission with reference to the facts set up in your petition before the Commission? (Showing witness paper.)

A. It is.

Mr. GLASGOW: I offer this Report in evidence, being case No. 1180, Henry E. Meeker and Caroline H. Meeker, co-partners, trading as Meeker & Company, vs. Lehigh Valley Railroad Company, decided June 2, 1911; Report of the Interstate Commerce Commission.

Mr. FIELD: I understand that this offer is confined to the Report and not the order, although you have both in your hand?

Mr. GLASGOW: I also offer the order of the Commission in the same case between the same parties, dated the 8th day of June, 1911, and ask that they both be marked Plaintiff's Exhibit 1.

Mr. FIELD: If your Honor please, I object to the admission, first, of the Report which is now offered, as being not the Report in the proceeding which is specified in the petition in this action, but the Report which was found by the Commission in an entirely different proceeding.

The COURT: How is that? That this is not a Report the Commission made?

Mr. FIELD: Not in this proceeding. Your Honor will understand there were two proceedings before the Commission, the first one stopping with the period July 17, 1907, the next proceeding covering the period from April, 1908, to April, 1910. The offer now made in a suit brought setting up the order and Report in the second proceeding, of the Report, and the rate order as to future rates, in the first proceeding, and I object on the ground, first, that there is no authority in the Statute and no authority of law to offer as prima facie evidence, or for any purpose in this case, a Report of the Commission in a proceeding entirely separate from and

tinued from the proceeding which is referred to in the proceeding in this case before the Court now. I have further objections, if your Honor will pass on that.

The COURT: I do not understand you. The objection is raised that the Report is not prima facie evidence in a case not the same case, or in a case not brought on this Report? Is that the idea?

Mr. FIELD: This case is brought upon a Report and order dated May 7, 1912. Mr. Glasgow now proposes to put in evidence a Report dated June 8, 1911, made by the Commission in an entirely different proceeding before the Commission.

Mr. GLASGOW: If your Honor will permit me, I think I can explain the situation, which is somewhat confused by the statement of my friend. On July 17, 1907, a complaint was filed charging that these rates were unjust and unreasonable. While that case was pending before the Commission, the complaint in the case following was filed, attacking the rates from July 17th on. Now in the first Report the Commission said—in the Report which I have now offered, “In a later complaint, filed April 13, 1910, No. 3235, styled 77 Henry E. Meeker v. Lehigh Valley Railroad Company, complainant seeks reparation on the basis of a rate of one dollar on all grades of coal shipped during the period July 1, 1907, to April 1, 1910, alleging a total overcharge during said period of \$55,290.73. As the subject matter of the two complaints is the same, in so far as the reasonableness of the rates is concerned, the disposition of the later case will perhaps be determined by the conclusions reached in this case.” Then when they came to make their Report in the second case, the supplemental Report, they made a joint Report in both cases as a supplemental Report, and they said: “On basis of our decision in No. 1180, and upon consideration of the evidence submitted at the hearing of the present case regarding the amount of reparation due complainant, we now find that the rates exacted by defendant \* \* \* were unreasonable”, etc. So that your Honor sees that the Commission bases its conclusion in the case that is now on trial upon the facts which it refers to as a part of its supplemental Report in the case running up to July 1, 1907. The whole transaction is one. As far as the order is concerned, the order which was entered on June 8, 1911, fixing what were reasonable rates, is the order which was in effect during the time covered by the second complaint.

The COURT: The Reports, the conclusions and the findings of fact in the Report are not what probably they might be for clearness, but it is not a proper thing that litigants should suffer by reason of any neglect of Government officials in inartistically or negligently drawing Reports, and, if the Interstate Commerce Commission draws a Report which substantially complies with the Act, it ought to be sustained, notwithstanding the fact that it shows a very negligent manner of treating the subject.

78 Objection overruled. Exception noted for defendant by direction of the Court.

(Papers marked Plaintiff's Exhibit No. 1, Nov. 12, 1912.)

Mr. FIELD: I object, if your Honor please, upon the further

ground that the Statute under which the Report is offered in evidence, Interstate Commerce Act, Section 16, is unconstitutional in that it deprives the defendant of due process of law.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. FIELD: The Report is invalid because, on its face, it purports to regulate commerce which was completed before the time when the order was made, and which, therefore, was not subject to regulation.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. FIELD: The alleged findings of the Commission are invalid and unconstitutional, in that they have the effect to deprive the defendant of its constitutional right to a trial by jury.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. FIELD: The findings take from the Court its judicial power to determine the rules of law governing the proceedings in this case, especially the rule of damages applicable to the case, and, further, in effect impose upon this Court as evidence in this case that which is not legal evidence, and, further, to impose upon this Court as findings of the Commission, conclusions not based on findings.

Objection overruled. Exception noted for defendant by direction of the Court.

79 Mr. FIELD: Because it contains no findings of fact, as required by the statute. It contains not a single finding upon which a reparation award can be based, or which is material or relevant in a reparation suit.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. FIELD: Because it contains many statements, purporting to be statements of evidence on the hearing before the Interstate Commerce Commission, arguments, opinions and conclusions, which the statute does not purport to make admissible as *prima facie* evidence.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. FIELD: Because the statements contained in the Report, if held to be findings of fact, are so confused with other matter as not to be distinguishable or separable.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. FIELD: The Report has no effect or competency in connection with an action for damages, because it does not set forth the alleged causes of action of which the award purports to be made up. In fact, the original Report specifically reserves all such statements to a subsequent order.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. FIELD: I would like to make further the general objection that the Report is incompetent as evidence in this case.

Objection overruled. Exception noted for defendant by direction of the Court.



Mr. FIELD: Now as to the order of June 8, 1911, offered  
80 at the same time, I make the same objection, to the effect that  
that is an order in a proceeding brought before the Commission  
which is not the proceeding set forth in the petition in this case,  
but an entirely different proceeding, and that there is no authority  
in the Act or any authority in law for introducing in this suit now  
before the Court an order of the Commission in that proceeding,  
either as prima facie evidence or for any other purpose.

Objection overruled. Exception noted for defendant by direction  
of the Court.

Mr. FIELD: I also would like to make the same objections to the  
order and have exceptions noted that I have just made as to the  
Report.

The COURT: Let it be understood that the objections made to the  
Report also apply to the order and that the objections are overruled  
and an exception noted for the defendant as to each objection.

Mr. FIELD: I make the general objection that the order is irrelevant  
and incompetent in this case.

Objection overruled. Exception noted for defendant by direction  
of the Court.

By Mr. GLASGOW:

Q. I read you the following sentence from the Report of the Commission  
on June 8, 1911: "We are of opinion and so find that defendant's rates  
for the transportation of coal from the Wyoming Region to Perth Amboy  
of \$1.55 per gross ton on prepared sizes, \$1.40 on pea coal and \$1.20  
on buckwheat coal are unreasonable so far as they exceed \$1.40 on prepared  
sizes, \$1.30 on pea coal and \$1.15 on buckwheat." Have you made up a  
statement showing the amount of damage that you claim on the basis of  
the difference between the rates which the Commission found to be  
unreasonable and the rates which they prescribe as the reasonable  
rates on the several amounts of coal which you shipped from the period  
81 April 13, 1908, to April 13, 1910?

A. Yes.

Q. What is that amount?

Mr. FIELD: I object to that as a conclusion, the proper evidence  
under the circumstances being the separate shipments and the separate  
causes of action on which the petition is brought for recovery, and  
the mere statement in bulk of one item is a legal conclusion and not  
evidence of any fact.

Objection overruled. Exception noted for defendant by direction  
of the Court.

By Mr. GLASGOW:

Q. Will you please state the amount?

A. \$10,813.60.

Q. Have you also calculated the interest upon each shipment, the  
excess paid upon each shipment during that period from the time  
of the payment thereof to September 1, 1911?

Mr. FIELD: I make the same objection to that, on the ground that there is no statement as to what the shipments were, or no proof of each shipment, or no proof to base such conclusions upon.

The COURT: See whether he has the basis.

Mr. GLASGOW: I am going to follow that right along. If he will state the amount, I will ask him how he got it.

The COURT: If it is followed up by proof of the basis upon which it was made and where it was obtained, it is admitted.

By Mr. GLASGOW:

Q. What amount?

A. \$1,526.53.

82 Q. Did you have made up a statement of each shipment and the amount paid thereon weekly, and the excess paid by you over the amount found by the Commission as a reasonable rate?

A. I did.

Q. Also the interest upon each excess amount from the time it was paid up to September 1, 1911?

A. Yes.

Q. Did you submit that statement to the Lehigh Valley Railroad Company?

A. Yes.

Q. Did they go over it?

A. They did.

Q. Did they make any statement to you as to whether it was correct or not?

Mr. FIELD: I object to that on the same ground, as an attempt to prove in the aggregate as a conclusion, and without any foundation for the conclusion, the aggregate of all his causes of action, without proving, as he should in this case, the causes of action upon which he sues.

Mr. GLASGOW: I am coming to that as soon as I can.

By Mr. GLASGOW:

Q. Did they say anything about the correctness of it?

A. They approved these figures and acknowledged them as correct.

Q. That the excess of the rates as shown over the Commission's finding and the interest as stated in that statement was correct?

A. Yes.

Q. Then did you submit that statement to the Interstate Commerce Commission?

A. Yes.

Q. And did they have a hearing upon the question of the amount of reparation?

83 A. Yes.

Mr. GLASGOW: Now, if your Honor please, I offer the supplemental Report of the Interstate Commerce Commission in case No. 3235, Henry E. Meeker vs. Lehigh Valley Railroad Company, de-

cided May 7, 1912, and the order thereto attached in the same case, a certified copy of it, and ask that it be marked Plaintiff's Exhibit No. 2.

Mr. FIELD: I object to the Report and order as incompetent evidence in this case.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. FIELD: The statute under which the Report is offered in evidence, Interstate Commerce Act, Section 16, is unconstitutional, in that it deprives the defendant of due process of law.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. FIELD: The Report is invalid, because on its face it purports to regulate commerce which was completed before the time that the order was made, and is, therefore, not subject to the regulation.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. FIELD: The alleged findings of the Commission are invalid and unconstitutional, in that they have the effect to deprive the defendant of its constitutional right to a trial by jury.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. FIELD: The findings take from the Court its judicial power to determine the rules of law governing the proceedings in this case, especially the rule of damages applicable to the case, and  
84 further, in effect impose upon this Court as evidence in this case, that which is not legal evidence, and further, to impose upon this Court as findings of the Commission, conclusions not based on findings.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. FIELD: It appears on the face of the Report and order that there was no evidence before the Commission on which it could base a conclusion as to the reasonableness of the rates in this suit.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. FIELD: That the Report contains no finding of fact as required by the Statute.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. FIELD: That the Report contains conclusions and opinions which the statute does not purport to make admissible as prima facie evidence.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. FIELD: If there are any findings of fact in the Report, they are so confused with other matters as not to be distinguishable or separable.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. FIELD: That the Report does not set forth the alleged causes

of action on which the award purports to be made up. It simply gives as a conclusion the total tonnage, the total freight payments, and does not set forth a single cause of action.

85       Objection overruled. Exception noted for defendant by direction of the Court.

Mr. FIELD: That it appears on the face of the Report that the total amount of the award by the Commission to be paid was the sum of several amounts claimed on several separate shipments; that each of such shipments is the basis of a separate cause of action, and the Report is inadmissible as not specifying in each the amount of the award by the Commission. The Report fails to state as to each cause of action the amount found due by the Commission, and, therefore, the Report is not, under Section 16, prima facie evidence as to any of the causes of action here sued upon.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. FIELD: I make the further objection to the supplemental Report, dated May 7, 1912, in so far as the subject matter upon the first page and also that on the second page relating to action before the Commission, No. 1180. The Report is a composite Report, covering, as it purports to on its face, two separate proceedings, half of the Report dealing with one proceeding and the other half with the other and I make the objection that that part of the Report which relates to the foreign proceeding is not relevant in this case.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. FIELD: I further object to the admission of the order offered on the ground that it is not competent evidence.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. FIELD: That the statute under which the order is  
86       offered in evidence, Interstate Commerce Act, Section 16, is unconstitutional, in that it deprives the defendant of due process of law.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. FIELD: The order of the Commission is invalid and unconstitutional, in that it has the effect to deprive the defendant of its constitutional right to a trial by jury.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. FIELD: The order takes from the Court its judicial powers to determine the rules of law governing the proceedings in this case, especially the rule of damages applicable to the case, and further, in effect impose upon this Court as evidence in this case, that which is not legal evidence, and further, to impose upon this Court as findings of the Commission conclusions not based on findings.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. FIELD: The order is invalid because, on its face, it purports to regulate commerce which was completed before the time when

the order was made, and which, therefore, was not subject to regulation.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. FIELD: The power to regulate commerce does not include the power to dispose of the proceeds of past transportation transactions. The power to prescribe what shall be a reasonable charge for interstate transportation does not include the power to say what shall be done with the money collected from shippers in the past.

87 Objection overruled. Exception noted for defendant by direction of the Court.

Mr. FIELD: It appears on the face of the Report and order that there was no evidence before the Commission on which it could base a conclusion as to the reasonableness of the rates involved in this suit.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. FIELD: The award made in the reparation order is not based on findings of fact required by the Act, as the Act requires that "in case damages are awarded, such Report shall include the findings of fact on which the Report is made." The Report contains no findings of fact to support the conclusions that any of the rates charged the plaintiff were unreasonable.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. FIELD: It appears on the face of the order that the total amount found by the Commission to be the amount of the alleged damages was the sum of several amounts claimed on several separate shipments of coal between November 1, 1900, and July 17, 1907, that each of such shipments is the basis of a separate cause of action, and the order is inadmissible as not specifying as to each the amount awarded by the Commission; that the order fails to state as to each judgment the amount found due by the Interstate Commerce Commission; therefore, the order is not, under Section 16, *prima facie* evidence as to any of the causes of action here sued upon.

Objection overruled. Exception noted for defendant by direction of the Court.

Mr. GLASGOW: In offering the Report, I offer it as a whole,

88 and I ask that the jury consider in that Report, and ask your Honor to direct that they consider only such parts as I now read, because that is the part which is pertinent to this inquiry. The Report is entitled both in case 1180 and 3235 heard together, in which they say:

"The original Report in No. 1180, 21 I. C. C. 129, disposed of all the questions at issue except the claim for reparation, and the case was held open for the purpose of securing further information regarding that feature. A further hearing has been held, and complainant has presented exhibits showing the total number of tons of each variety of coal shipped and the amount of reparation due on such shipments. These exhibits have been examined by defendant and admitted to be correct."

I omit, if your Honor please, from that point down to near the bottom of page 481.

(Beginning with the words, "With the exception of the reparation features," at the bottom of page 481, Mr. Glasgow read the remainder of the supplemental Report to the bottom of page 482, closing with the words, "Orders will be issued in accordance with the findings herein announced.")

Mr. GLASGOW: That is the part of the Report which I ask to be submitted. The orders of the Commission directing the payment of the amount found in this supplemental Report, which I have just read, follow that report and direct the payments to be made, and I have already read that to the jury.

In my offer of this Exhibit No. 2 I inadvertently offered, as a part of it, the order in case No. 1180. I wish that to be withdrawn and not to be considered by the jury, leaving the offer the supplemental Report, so far as I have read it, and the order in case No. 3235.

89 (Papers marked Plaintiff's Exhibit 2, November 12, 1912.)

Mr. GLASGOW: It is admitted by counsel for the defendant, as I understand, that these Reports and orders which I have offered in evidence were duly served upon the defendant, and I will state the dates, if desired: That Exhibit No. 1 was duly served upon the defendant on July 1, 1911, and that Exhibit No. 2 was served upon the defendant on May 25, 1912.

Mr. FIELD: The defendant makes that admission.

By Mr. GLASGOW:

Q. In this order of the Commission which I have read, the order of the Commission of May 7, 1912, the defendant was ordered to pay to you the sum of \$10,813.60, with interest at the rate of six per centum per annum, amounting to \$1,526.53, as of September 1, 1911, with interest on \$10,813.60 after September 1, 1911. Has that sum, or the interest, or any part of it, been paid to you?

A. No.

Q. Were the freight rates during the period April 13, 1908, to April 13, 1910, paid by you to the Lehigh Valley Railroad Company?

A. Yes.

Cross-examination.

By Mr. FIELD:

Q. You referred at the beginning of your examination to a statement which you filed with the Commission, being the same statement which you checked over, or had your assistant check over, with the accounting officers of the defendant railroad. I show you a statement and ask you if that is one of the carbon copies of the original statement which you referred to?

A. Yes.

90

Q. The supplemental Report, Exhibit 2, and also the reparation order in this case; also a part of Exhibit 2, refer to

schedule of shipments filed with the Commission, the order referring to it as Exhibit 1. Is that the paper so referred to?

A. Yes.

Q. This paper includes, does it not, shipments prior to the period covered by this suit; that is to say, shipments between July 23, 1907, and April 23, 1908?

A. Yes.

Q. But the shipments stated on this paper subsequent to April 23, 1908, represent the shipments which are the subject matter of this suit, do they not, from April 23, 1908, to February 2, 1910?

A. Yes.

Q. And those are the shipments that are included in the order of the Commission, Exhibit 2, in this case?

A. I do not know about the number of the exhibit.

Mr. FIELD: It is your Exhibit 2, Mr. Glasgow.

The WITNESS: Oh, in this case? Yes.

The COURT: I understood the shipments ran from the 13th of April, 1908, to the 13th of April, 1910.

Mr. FIELD: Mr. Meeker shipped nothing after February 2d.

The COURT: They began only on the 23d?

Mr. FIELD: No; he had some prior shipments, but they were barred by the statute.

By Mr. FIELD:

Q. The footings on this shipment carry forward all shipments from July 17th?

A. Yes.

Q. So that the final footing on the last page includes not only the shipments covered by the Commission's order, Exhibit 2 in 91 & 92 this case, but all shipments from July 23, 1907? The footings cover all shipments?

A. Yes.

Plaintiff Rests.

*Evidence on Behalf of Defendant.*

Mr. FIELD: I offer in evidence the schedule referred to by the petitioner's witness, Mr. Meeker, referring only to that part of the schedule covering shipments between April 13, 1908, and the end of the schedule, covering the date, February 2, 1910, with the further statement on the record that Mr. Meeker testified that the footings were not in accordance with the order, because they include previous amounts. That is very clear by Mr. Meeker's testimony. In other words, to get the footing in the order, you have to deduct from the footing in this exhibit the shipments which are omitted from this exhibit because barred by the two-year statute.

Mr. GLASGOW: And that was what was done by the Commission.

Mr. FIELD: That was what was done by the Commission. I would

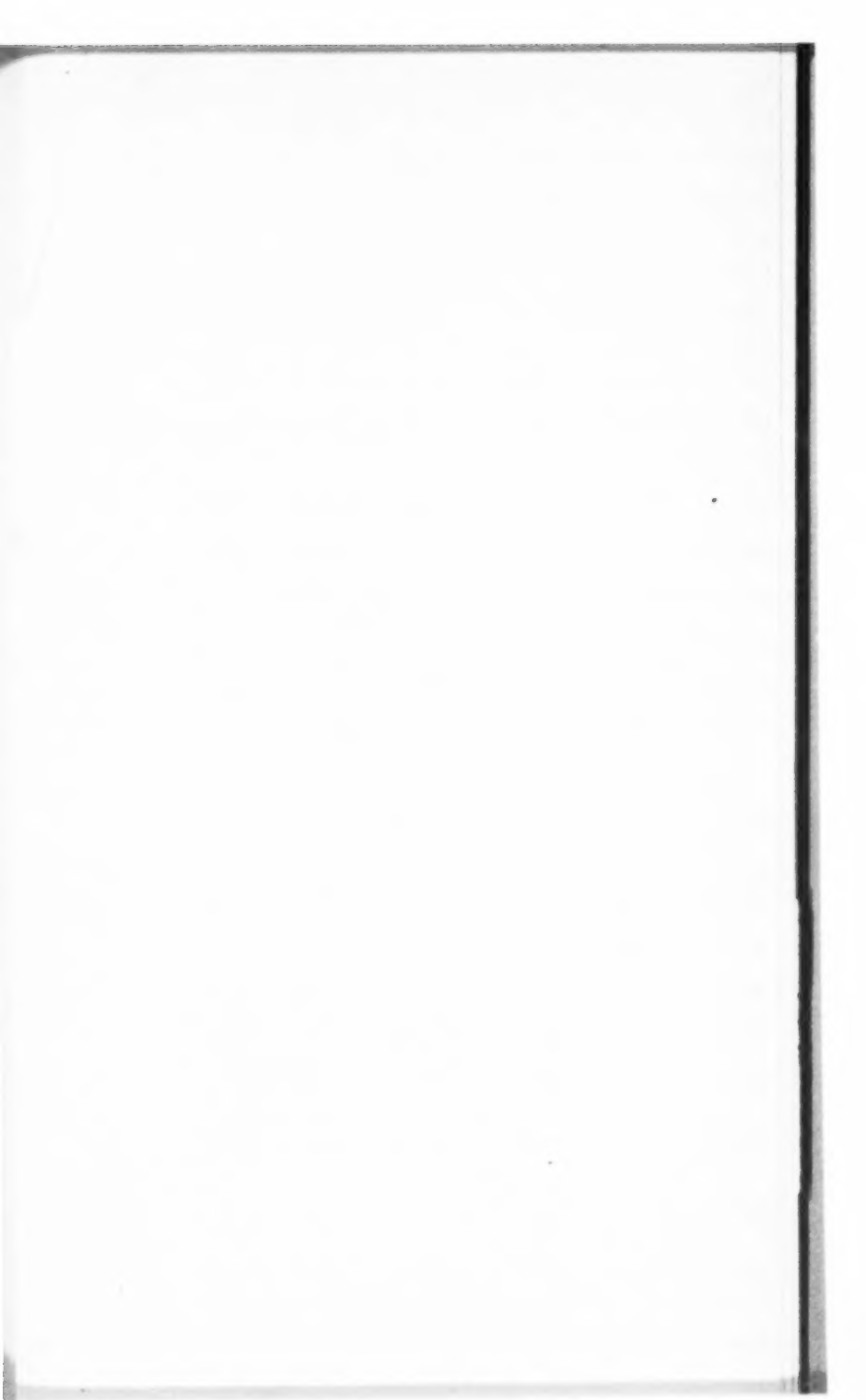


also like to state on the record, with Mr. Glasgow's consent, that the fourth column from the last, being as to the first item on the exhibit covering the shipment April 23, 1908, the item 4-25, refers to the date when Mr. Meeker paid the draft for that shipment; in other words, that the bill of April 23, 1908, was paid by the acceptance of a draft on April 25, 1908, by draft meaning the company's draft on Mr. Meeker for the freight.

(Schedule marked Defendant's Exhibit A, November 12, 1912.)  
Defendant Rests.

Testimony Closed.

(Here follow pasters marked pages 93 to 110.)



								To Sep. 1, 1911.			
	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time	Interest	
July 23, 1907 25		88.05		123.55.	123.55	114.72	114.72	8.83	7/26 4	36	2.17
Aug. 2, 1907 26	666.15			1,033.46		933.45					
Aug. 9, 1907 27	465.18	402.17		563.99	1,597.45	523.70	1,457.15	140.30	8/8 4	23	34.20
Aug. 16, 1907 28	962.07	67.13		722.15		652.26					
Aug. 23, 1907 29	559.15	155.08		94.71	816.86	87.95	740.21	76.65	8/13 4	18	18.63
Sep. 2, 1907 30	665.17			1,491.64		1,347.29					
Sep. 9, 1907 31	300.19			217.56	1,709.20	202.02	1,549.31	159.89	8/21 4	10	38.64
Sep. 16, 1907 32	526.00			867.61	867.61	783.65	783.65	83.96	8/27 4	4	20.21
Sep. 23, 1907 33	644.19			1,032.07	1,032.07	932.19	932.19	99.88	9/7 3	358	23.95
Oct. 2, 1907 34	1,631.00			466.47	466.47	421.33	421.33	45.14	9/13 3	352	10.77
Oct. 9, 1907 35	92.05			815.30	815.30	736.40	736.40	78.90	9/19 3	346	18.76
Oct. 16, 1907 36	512.01			999.67	999.67	902.93	902.93	96.74	9/26 3	339	22.89
Oct. 23, 1907 37	732.01			2,528.05	2,528.05	2,283.40	2,283.40	244.65	10/8 3	327	57.39
Nov. 2, 1907 38	363.15	425.15		142.99	142.99	129.15	129.15	13.84	10/12 3	323	3.24
Nov. 9, 1907 39	44.18	122.06		793.68	793.68	716.87	716.87	76.81	10/19 3	316	17.87
Nov. 16, 1907 40	304.16		204.00	1,134.68	1,134.68	1,024.87	1,024.87	109.81	10/26 3	309	25.43
Nov. 23, 1907 41	180.05		25.02	563.81		509.25					
Dec. 3, 1907 42	960.07			596.05		553.47					
Dec. 10, 1907 43	540.19			245.16	1,405.02	234.94	1,297.66	107.36	11/9 3	295	24.58
Dec. 17, 1907 44	503.13			69.60		62.86					
Dec. 24, 1907 45	544.01	29.02		171.22		158.99					
Jany. 2, 1908 46	1,278.17	26.04		30.12	270.94	28.86	250.71	20.23	11/12 3	292	4.61
Jany. 9, 1908 47-1	156.16	185.13		472.44	472.44	426.72	426.72	45.72	11/19 3	285	10.42
Jany. 16, 1908 48-2	251.05		24.18	279.39	279.39	252.35	252.35	27.04	11/26 3	278	6.12
Jany. 23, 1908 3	116.18			1,488.54	1,488.54	1,344.49	1,344.49	144.05	12/7 3	267	32.34
				838.47	838.47	757.33	757.33	81.14	12/12 3	262	18.15
				780.66	780.66	705.11	705.11	75.55	12/19 3	255	16.82
				843.28		761.67					
				40.74	884.02	37.83	799.50	84.52	12/27 3	247	18.71
				1,982.22		1,790.39					
				36.68		34.06					
				565.50	2,584.40	541.93	2,366.38	218.02	1/9 3	234	47.74
				243.04		219.52					
				259.91		241.34					
				29.88	532.83	28.63	489.49	43.34	1/11 3	232	9.46
				389.44	389.44	351.75	351.75	37.69	1/20 3	223	8.19
				181.20	181.20	163.66	163.66	17.54	1/25 3	218	3.81

	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time	Interest
									Yrs. Days.	
Forward	13,006.07	1,503.03	725.11		23,134.93		20,997.33	2,137.60		495.10
Feby. 2, 1908	1,427.18			2,213.25		1,999.06				
4		360.00		504.00		468.00				
			812.10	975.00	3,692.25	934.37	3,401.43	290.82	2/8 3 204	62.24
Feby. 9, 1908	274.09			425.40		384.23				
5		116.01		162.47	587.87	150.86	535.09	52.78	2/12 3 200	11.27
Feby. 16, 1908	28.12			44.33		40.04				
6		312.07		437.29	481.62	406.05	446.09	35.53	2/20 3 192	7.55
Feby. 23, 1908		410.09		574.63	574.63	533.58	533.58	41.05	2/27 3 185	8.65
7										
Mch. 3, 1908	957.09			1,484.05		140.43				
8		650.07		910.49		345.45				
			386.03	463.38	2,857.92	444.07	2,629.95	227.97	3/7 3 177	47.76
Mch. 10, 1908	628.12			974.33		880.04				
9		72.12		101.64		94.38				
			21.10	25.80	1,101.77	24.72	999.14	102.63	3/12 3 172	21.43
Mch. 17, 1908		162.19		228.13	228.13	211.83	211.83	16.30	3/19 3 165	3.37
10										
Mch. 24, 1908	939.07			1,455.99		1,315.09				
11		214.11		300.37	1,756.36	278.91	1,594.00	162.36	3/26 3 158	33.49
Apl. 2, 1908	3,517.13			5,452.36		4,924.71				
12		513.11		718.97		667.61				
			406.15	488.10	6,659.43	467.76	6,060.08	599.35	4/9 3 144	22.25
Apl. 9, 1908	852.13			1,321.61		1,193.71				
13		38.17		54.39		50.50				
			71.08	85.68	1,461.68	82.11	1,326.32	135.36	4/11 3 142	27.56

	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time Yrs. Days.	Interest
Forward	21,633.00	4,354.17	2,423.17		42,536.59		38,734.84	3,801.75		840.67
Apl. 23, 1908	108.05			167.79		151.55				
15		523.11		732.97	900.76	680.61	832.16	68.60	4/25 3 128	13.82
May 2, 1908	152.05			235.99		213.15				
16		92.02		128.94	364.93	119.73	332.88	32.05	5/6 3 117	6.39
May 9, 1908	120.15			187.16	187.16	169.05	169.05	18.11	5/11 3 112	3.60
17										
May 16, 1908	471.10			730.83		660.10				
18		96.06		134.82		125.19				
			30.10	36.60	902.25	35.07	820.36	81.89	5/19 3 104	16.16
May 23, 1908	622.03			964.33		871.01				
19		475.19		666.33	1,630.66	618.73	1,489.74	140.92	5/26 3 97	27.64
June 2, 1908	365.14			566.84		511.98				
20		444.01		621.67	1,188.51	577.26	1,089.24	99.27	6/6 3 86	19.22
June 9, 1908	665.10			1,031.53	1,031.53	931.70	931.70	99.83	6/11 3 81	19.32
21										
June 16, 1908	1,086.06			1,683.77		1,520.82				
22		392.13		549.71		510.44				
			333.08	400.08	2,633.56	383.41	2,414.67	218.89	6/18 3 74	42.10

Forward	25,225.08	6,379.09	2,787.15	95	46,814.64	4,561.31	988.99
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TORN PAGES

	Prepared	Pea.	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time	Interest
									Yrs. Days.	
Forward	25,225.08	6,379.09	2,787.15		51,375.95		46,814.64	4,561.31		988.99
June 23, 1908	711.02			1,102.21		995.54				
23		366.16		513.52		476.84				
July 2, 1908	75.05		321.01	385.26	2,000.99	369.20	1,841.58	159.41	6/25 3 67	30.47
24		1,049.11		116.64		105.35				
July 16, 1908	908.14		765.00	1,469.37		1,364.41				
25				918.00	2,504.01	879.75	2,349.51	154.50	7/10 3 52	29.16
July 23, 1908	1,057.04			1,408.49		1,272.18	1,272.18	136.31	7/18 3 44	25.53
26		597.05		1,638.66		1,480.08				
Aug. 2, 1908	1,381.17			836.15	2,474.81	776.42	2,256.50	218.31	7/25 3 37	40.64
27		768.08		2,141.87		1,934.59				
Aug. 9, 1908		269.16	428.02	1,075.76		998.92	3,425.83	305.52	8/8 3 23	56.16
28				513.72	3,731.35	492.32				
Aug. 16, 1908		165.16	165.06	377.72		350.74				
29				198.36	576.08	190.09	540.83	35.25	8/13 3 18	6.46
Aug. 23, 1908		378.15		232.12	232.12	215.54	215.54	16.58	8/20 3 11	3.01
30				530.25	530.25	492.38	492.38	37.87	8/27 3 04	6.85
Sept. 2, 1908	89.17									
31		943.05		139.27		125.79				
Sept. 9, 1908		263.02	42.00	1,320.55	1,510.22	1,226.22	1,400.31	109.91	9/9 2 356	19.71
32				50.40		48.30		26.31	9/12 2 353	4.69
Sept. 16, 1908	48.17			368.34	368.34	342.03	342.03			
33		483.05		75.72		68.39				
Sept. 23, 1908		79.13	213.07	676.55	1,008.29	628.22				
34				256.02		245.35	941.96	66.33	9/19 2 346	11.77
Oct. 2, 1908		888.03		111.51	111.51	103.54	103.54	7.97	9/26 2 339	1.41
35										
Oct. 9, 1908		27.14	516.04	1,243.41	1,862.85	1,154.59	1,748.22	114.63	10/10 2 325	19.99
36				619.44		593.63				
Oct. 16, 1908		164.18	84.18	38.78		36.01				
37				101.88	140.66	97.63	133.64	7.02	10/13 2 322	1.22
Oct. 23, 1908	276.06			230.86	230.86	214.37	214.37	16.49	10/20 2 315	2.82
38		511.11		428.27		386.82				
Nov. 2, 1908	1,527.00		79.12	716.17		665.01				
39		859.11		95.52	1,239.96	91.54	1,143.37	96.59	10/27 2 308	16.57
Nov. 9, 1908	310.02		625.05	2,366.85	4,320.52	2,137.80	3,974.25	346.27	11/10 2 294	58.50
40		160.08		1,203.37		1,117.41				
Nov. 17, 1908	93.01		110.09	750.30		719.04				
41				480.66		434.14				
Nov. 23, 1908				224.56		208.52				
42				132.54	837.76	127.02	769.68	68.08	11/12 2 292	11.47
				144.23		130.27				
			222.07	266.82	411.05	255.70	385.97	25.08	11/19 2 285	4.20
			91.07	109.62	109.62	105.05	105.05	4.57	11/26 2 278	.78

	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time	Interest
									Yrs. Days.	
Forward	31,704.13	14,357.06	6,452.13		76,985.69		70,471.38	6,514.31		1,340.40
Dec. 2, 1908	821.00			1,272.55		1,149.40				
43		84.16		118.72		110.24				
			355.12	426.72	1,817.99	408.94	1,668.58	149.41	12/8 2 266	24.53
Dec. 9, 1908	1,112.19			1,725.07		1,558.13				
44		85.15		120.05	1,845.12	111.47	1,669.60	175.52	12/12 2 262	28.74
Dec. 16, 1908	167.07			259.39		234.29				
45		126.13		177.31		164.64				
			48.06	57.96	494.66	55.55	454.48	40.18	12/19 2 256	6.52
Dec. 23, 1908	476.03			738.03		666.61				
46		42.19		60.13	798.16	55.83	722.44	75.72	12/26 2 248	12.23
Jan. 2, 1909	1,611.11			2,497.90		2,256.17				
47		532.01		744.87		691.66				
			272.19	327.54	3,570.31	313.89	3,261.72	308.59	1/9 2 234	49.08
Jan. 9, 1909	225.19			350.22		316.33				
48-1		296.09		415.03		385.38				
			183.03	219.78	985.03	210.62	912.33	72.70	1/12 2 231	11.53
Jan. 16, 1909	741.15			1,149.71	1,149.71	1,038.45	1,038.45	111.26	1/19 2 224	17.49
49-2										
Jan. 23, 1909	484.04			750.51		677.88				
3		82.03		115.01	865.52	106.80	784.68	80.84	1/26 2 217	12.63
Feb. 2, 1909	2,675.10			4,147.03		3,745.70				
4		658.08		921.76		855.92				
			416.08	499.68	5,568.47	478.86	5,090.48	487.99	2/9 2 203	75.07
Feb. 9, 1909	173.01			268.23		242.27				
5			41.17	50.22	318.45	48.13	290.40	28.05	2/11 2 201	4.31
Feb. 16, 1909	346.00			536.30		484.40				
6		134.06		188.02	724.32	174.59	658.99	65.33	2/17 2 195	9.95
Feb. 23, 1909	178.08			276.52		249.76				
7		186.14		261.38	537.90	242.71	492.47	45.43	2/25 2 187	6.85
Mch. 2, 1909	337.13			523.36		472.71				
8		235.02		329.14		305.63				
			360.11	432.66	1,285.16	414.63	1,192.97	92.19	3/6 2 178	13.79
Mch. 9, 1909	222.11			344.95		311.57				
9		42.00		58.80	403.75	54.60	366.17	37.58	3/11 2 173	5.61
Mch. 16, 1909	574.07			890.24	890.24	804.09	804.09	86.15	3/18 2 166	12.72
10										
Mch. 23, 1909			67.00	80.40	80.40	77.05	77.05	3.35	3/25 2 159	.48
11										
Apr. 2, 1909	535.03			829.48		749.21				
12		622.05		871.15		808.92				
			796.13	955.98	2,656.61	916.15	2,474.28	182.33	4/8 2 145	26.27



	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time	Interest
Forward	42,388.04	17,486.17	8,995.02		109,977.49		92,420.56	8,556.93	Yrs. Days.	1,658.20
Apl. 9, 1909		136.09		191.03		177.38				
13			27.06	32.76	223.79	31.40	208.78	15.01	4/13 2 140	2.15
Apl. 16, 1909	264.00			409.20		369.60				
14		581.03		813.61		755.50				
Apl. 23, 1909			302.12	363.12	1,585.93	347.99	1,473.09	112.84	4/20 2 132	16.04
15	45.02			69.91		63.14				
		532.00		744.80		691.60				
May 2, 1909			392.02	470.52	1,285.23	450.91	1,205.65	79.58	4/27 2 126	11.23
16		1,198.05		1,677.55		1,557.72				
May 9, 1909			800.14	960.84	2,638.39	920.80	2,478.52	159.87	5/8 2 115	22.25
17		46.01		64.47		59.86				
May 16, 1909			73.13	88.38	152.85	84.70	144.56	8.29	5/13 2 110	1.14
18	184.11			286.05		258.37				
		759.13		1,063.51		987.54				
May 23, 1909			637.07	764.82	2,114.38	732.95	1,978.86	135.52	5/20 2 103	18.59
19	89.12			138.88		125.44				
		401.19		562.73		522.54				
June 2, 1909			292.07	350.82	1,062.43	336.20	984.18	68.25	5/27 2 96	9.28
20	86.15			134.46	134.46	121.45	121.45	13.01	6/8 2 84	1.74
June 16, 1909	699.00			1,083.45		978.60				
21		574.19		804.93		747.43				
June 23, 1909			502.14	603.24	2,491.62	578.10	2,304.13	187.49	6/19 2 73	24.78
22	1,379.16			2,138.69		1,931.72				
		770.09		1,078.63		1,001.58				
July 1, 1909			836.19	1,004.34	4,221.66	962.49	3,895.79	325.87	6/26 2 66	42.69
23	1,197.18			1,856.75		1,677.06				
		925.16		1,296.12		1,203.54				
July 8, 1909			925.13	1,110.78	4,263.65	1,064.49	3,945.09	318.56	7/10 2 52	40.99
24	180.06			279.47		252.42				
		73.06		102.62		95.29				
July 16, 1909			26.11	31.86	413.95	30.53	378.24	35.71	7/13 2 49	4.58
25	719.16			1,115.69		1,007.72				
		255.01		357.07		331.56				
July 23, 1909			439.02	526.92	1,999.68	504.96	1,844.24	155.44	7/20 2 42	19.74
26	908.17			1,408.72		1,272.39				
		425.18		596.26		553.67				
Aug. 2, 1909			647.18	777.48	2,782.46	745.08	2,571.14	211.32	7/27 2 35	26.59
27	2,396.16			3,715.04		3,355.52				
		936.00		1,310.40		1,216.80				
			1,106.00	1,327.20	6,352.64	1,271.90	5,844.22	508.42	8/10 2 21	62.79

Forward	50,540.13	25,103.16	16,006.00	132,690.61	121,798.50	10,892.11	1,962.78
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	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time Interest	
									Yrs. Days	
Forward	50,540.13	25,103.16	16,006.00		132,690.61		121,798.50	10,892.11		1,962.78
Aug. 10, 1909	341.07			529.09		477.89				
28		257.13		360.71		334.94				
			319.03	382.98	1,272.78	367.02	1,179.85	92.93	8/12 2 19	11.44
Aug. 17, 1909	356.05			552.19		498.75				
29		246.19		345.73		321.03				
			173.09	208.14	1,106.06	199.46	1,019.24	86.82	8/19 2 12	10.59
Aug. 24, 1909	72.01			111.68		100.87				
30		159.02		222.74		206.83				
			64.10	77.40	411.82	74.17	381.87	29.95	8/26 2 5	3.62

Forward	51,310.06	25,767.10	16,563.02	135,481.27	124,379.46	11,101.81	1,988.43
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	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time	Interest
									Yrs. Days	
Forward	51,310.06	25,767.10	16,563.02		135,481.27		124,379.46	11,101.81		1,988.43
Sept. 2, 1909	1,411.08			2,187.67		1,975.96				
31		1,006.12		1,409.24		1,308.58				
			1,456.05	1,747.50	5,344.41	1,674.69	4,959.23	85.18	9/9 1 356	45.95
Sept. 9, 1909	266.10			413.08		373.10				
32		305.02		427.14		396.63				
			232.17	279.42	1,119.64	267.77	1,037.50	82.14	9/11 1 354	9.77
Sept. 16, 1909	624.19			968.67		874.93				
33		257.09		360.43		334.68				
			381.05	457.50	1,786.60	438.44	1,648.05	38.55	9/18 1 347	16.34
Sept. 23, 1909	872.10			1,352.38		1,221.50				
34		422.07		591.29		549.05				
			479.08	575.28	2,518.95	551.31	2,321.86	197.09	9/25 1 340	22.98
Oct. 2, 1909	1,794.18			2,782.10		2,512.86				
35		418.06		585.62		543.79				
			834.18	1,001.88	4,309.60	960.13	4,016.78	352.82	10/9 1 326	40.35
Oct. 9, 1909	188.04			291.71		263.48		28.23	10/12 1 323	3.20
36										
Oct. 16, 1909	412.15			639.76		577.85				
37		123.04		172.48		160.16				
			81.06	97.56	909.80	93.49	831.50	78.30	10/19 1 316	8.80
Oct. 23, 1909	446.05			691.69		624.75				
38		206.10		289.10		268.45				
			240.14	288.84	1,269.63	276.80	1,170.00	99.63	10/26 1 309	11.13
Nov. 2, 1909	1,179.14			1,828.54		1,651.58				
39		268.05		375.55		348.72				
			346.16	416.16	2,620.25	398.82	2,399.12	221.13	11/10 1 294	24.10
Nov. 9, 1909	347.06			538.32		486.22				
40			83.13	100.38	638.70	96.20	582.42	56.28	11/11 1 293	6.11
Nov. 16, 1909	627.10			972.63		878.50				
41		195.00		273.00		253.50				
			179.18	215.88	1,461.51	206.88	1,388.88	122.63	11/18 1 286	13.23
Nov. 23, 1909	714.03			1,106.93		999.81				
42		344.13		482.51		448.04				
			228.19	274.74	1,864.18	263.29	1,711.14	153.04	11/26 1 278	18.27

Forward	60,196.08	29,314.18	21,109.01		159,676.25		146,659.42	13,016.83		2,296.66
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	Prepared	Pea	Buck.	Amt. Chgd.	Total	Adj. Basis	Total	Excess	Time	Interest
									Yrs. Days	
Forward	60,196.08	29,314.18	21,109.01		159,676.25		146,659.42	3,016.83		2,206.66
Dec. 2, 1909	2,096.10			3,249.58		2,935.10				
43			274.02	328.92	3,578.50	315.21	3,250.31	328.19	12/9 1 265	34.18
Dec. 9, 1909	755.09			1,170.95		1,057.63				
44			244.18	293.88	1,464.83	281.63	1,339.26	125.57	12/11 1 263	13.05
Dec. 16, 1909	873.13			1,354.16		1,223.11				
45		392.11		549.57		510.32				
			483.04	579.84	2,483.57	555.68	2,289.11	194.46	12/18 1 256	19.95
Dec. 23, 1909	1,200.03			1,860.23		1,680.21				
46		497.12		696.64		646.88				
			446.01	535.26	3,092.13	512.96	2,840.05	252.08	12/27 1 247	25.49
Jany. 2, 1910	1,123.11			1,741.50		1,572.97				
47		468.06		655.62		608.79				
			532.19	639.54	3,036.66	612.89	2,794.65	242.01	1/8 1 235	24.00
Jany. 9, 1910	678.15			1,052.06		950.25				
48		174.10		244.30		226.85				
			261.07	313.62	1,609.98	300.55	1,477.65	132.33	1/13 1 230	13.00
Jany. 16, 1910	42.10			65.88		59.50				
2		83.08		116.76		108.42				
			347.16	417.36	600.00	399.97	567.89	32.11	1/20 1 223	3.12
Jany. 23, 1910	746.01			1,156.38		1,044.47				
3		311.12		436.24		405.08				
			419.19	503.94	2,096.56	482.94	1,932.49	164.07	1/27 1 216	15.74
Feby. 2, 1910	692.02			1,072.76		968.94				
4		84.06		118.02		109.59				
			308.19	370.74	1,561.52	355.29	1,433.82	127.70	2/8 1 204	12.01

\$68,405.02	31,327.03	24,428.06	179,200.00	164,584.65	14,615.35	2,367.20
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*Charge of Court.*

n. JAMES B. HOLLAND, J.:

GENTLEMEN OF THE JURY: In this case Henry E. Meeker, the petitioner, has instituted suit against the Lehigh Valley Railroad Company to recover the sum of \$10,813.60, with interest at six per cent. per annum from September 1, 1911 to July 15, 1912, amounting to \$567.05, making an aggregate of \$12,907.18, on which amount he claims interest from July 15, 1912, upon a Report of the Interstate Commerce Commission, on a petition presented by this plaintiff, alleging injury through unreasonable rates charged by the railroad company for the transportation of freight which the plaintiff, as a shipper, shipped over its road from the Wyoming Valley, Pennsylvania, to Perth Amboy, in New Jersey, during a period from April 13, 1908 to April 13, 1910.

The amount awarded as reparation by the Commission, as I have said, is \$12,907.18, and it is awarded on a petition presented, as I have said to you, by the plaintiff, alleging damages for an unreasonable charge for the transportation of coal over defendant's line. The Interstate Commerce Commission, under Section 14 of the Act, investigated the charge and found, as a conclusion, that there was an unreasonable rate charged, and directed the railroad company, as required by the Section of the Act, to make reparation to the plaintiff for this injury. That Report was filed by the Interstate Commerce Commission on June 8, 1911, and a supplemental Report was filed on May 7, 1911, awarding to the plaintiff the amount I have said and directing the railroad company to pay this amount. The defence in this case is that the railroad company has not paid that amount to the plaintiff. The plaintiff has offered in evidence these reports, showing that the Commission investigated and found that the plaintiff was damaged by reason of unreasonable rates and awarded this amount as reparation. These reports are in evidence, and they are made prima facie evidence of the fact that the Interstate Commerce Act. The railroad having failed to comply with the order of the Commission, in accordance with the provisions of the Interstate Commerce Act, the plaintiff instituted this suit in the United States Circuit Court, and he is now presenting his case and I instruct you that, in the absence of any countervailing evidence, either circumstantial or direct, the evidence here submitted is prima facie of the fact found in these reports, and sufficient upon which you can base a verdict in favor of the plaintiff if you take the report as evidence as directed by law, for the amount which is claimed by the plaintiff. That amount is a total of \$13,161.78.

The defendant asks me to charge you on a number of points submitted, which I refuse without reading to the jury.

Mr. PLATT: Will your Honor allow us certain exceptions? We object to the statement in your Honor's charge that this is a suit on the order of the Interstate Commerce Commission.

Exception noted as requested by direction of the Court.

Also to the statement that the amount is awarded by the Commission on a complaint for damages for excessive charges.

Exception noted as requested by direction of the Court.

Also to the statement that the Commission found that there was an unreasonable charge.

Exception noted as requested by direction of the Court.

Also to the statement that the Report in this case was filed on June 8, 1911.

Exception noted as requested by direction of the Court.

113 Also to the statement that the reports and order are made prima facie evidence of the facts by the Interstate Commerce law.

Exception noted as requested by direction of the Court.

Also to the statement, "I instruct you, in the absence of other countervailing evidence, either substantial or direct; that the evidence submitted is prima facie evidence of the facts found in these reports, and sufficient to base a verdict upon."

Exception noted as requested by direction of the Court.

Also to the refusal of the Court to charge as requested in defendant's points for Charge.

Defendant's points for Charge, which were refused by the Court without reading, are as follows:

"Upon the whole case, the verdict must be for the defendant."

To the refusal of the Court to charge in accordance with the foregoing point an exception is noted for defendant by direction of the Court.

"The order and Report on which the petitioner relies, both for the establishment of his case in this Court and for the jurisdiction of this Court in this action, are invalid, unconstitutional and void, in that they deprive the defendant of due process of law, it not being within the power of Congress to provide by Legislative enactment that the Interstate Commerce Commission can make findings upon which there may be claim for a reparation of damages to a petitioner before that body, and then provide that on the trial of a suit to recover such alleged damages, the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and, therefore, the verdict must be for the defendant."

114 To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

"The order and findings of the Commission were invalid and unconstitutional, in that they have the effect to deprive the defendant of its constitutional right to a trial by jury. The order and findings assume to take from the Court its judicial powers to determine the rules of law governing the proceedings in this case, especially the rule of damages applicable to the case; and further, in effect impose upon this Court, as evidence in this case, that which is not legal evidence, and further, to impose upon this Court, as findings of the Commission, conclusions not based on findings, and, therefore, the verdict must be for the defendant."

To the refusal of the Court to charge in accordance with the fore-



going point an exception is noted for defendant by direction of the Court.

"The order and findings upon which the plaintiff's case rests are invalid, because on their face they purport to regulate commerce which was completed before the time when the order was made, and which, therefore, was not subject to regulation at that time, it not being within the power of Congress to provide by legislative enactment that the Interstate Commerce Commission can make findings upon which there may be a claim for a reparation of damages to a petitioner before that body, and then provide that on the trial of a suit to recover such alleged damages the findings and order of the Commission shall be prima facie evidence of the facts therein stated. The power to regulate commerce does not include the power to dispose of proceeds of past transportation transactions. The power to prescribe what shall be a reasonable charge for interstate transportation does not include the power to say what shall be done with the money collected from shippers in the past, and, therefore, the verdict must be for the defendant."

115 To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

"The award made in the reparation order is not based on the findings of fact required by the Act, as the Act requires that, in case damages are awarded, such reports shall include the findings of fact on which the award is made, and the Report contains no finding of fact to support a conclusion that any of the rates charged the plaintiff were unreasonable, and, therefore, the verdict must be for the defendant."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

"It appears on the face of the order and in the Report that the total amount awarded by the Interstate Commerce Commission was the sum of several amounts claimed on several separate shipments of coal between April 13, 1908 and April 13, 1910, and that each such shipment was the basis of a separate cause of action. There was no finding by the Commission as to the several amounts due upon the several causes of action, and, therefore, the verdict should be for the defendant."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

"There is no competent evidence in this case, either by way of findings or statements, or evidence of any kind, that the rates charged by the defendant railroad for transporting coal to Perth Amboy, from April 13, 1908 to April 13, 1910, were unreasonable, unjust or excessive, and, therefore, the verdict should be for the defendant."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for the defendant by direction of the Court.

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"There is no competent evidence either by way of findings or statements, or any other evidence in this case, that the petitioner was in any way damaged by the alleged imposition of unreasonable rates on the part of the railroad, and, therefore, the verdict should be for the defendant."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

There is no competent evidence, either by way of findings or statements, or any other evidence in this case, that the reduced rates on which the amount of the alleged reparation is computed, were at any time between April 13, 1908 and April 13, 1910, reasonable or duly compensatory, and, therefore, the verdict should be for the defendant."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

"The order and findings do not show that petitioner has been injured; on the contrary, they show that the award of reparation to him is a discrimination in his favor against other shippers and a judgment in his favor would constitute such discrimination; therefore, the verdict should be for the defendant."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

"Inasmuch as it appears that petitioner was charged and paid the correct tariff rates, according to tariffs duly filed pursuant to Section 6 of Act, therefore, petitioner cannot recover back any part of 117 the freights so paid to the railroad, and, therefore, the verdict should be for the defendant."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

"The order and reports on which petitioner rests his case are invalid and void, because in the proceedings before the Commission, the Commission failed to give to the defendant railroad the hearing provided for in the Interstate Commerce Commission Act, which said hearing the Act provides, shall be a condition precedent to the making of any valid order or findings, and, therefore, the verdict should be for the defendant."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

"It appears on the face of the Report that the Commission drew conclusions from the evidence before it, which conclusions were controlling in the proceedings of the Commission, and were, as a matter of law, incorrect and improper conclusions; said conclusions being the conclusion as to reasonableness of rates."

To the refusal of the Court to charge in accordance with the foregoing point, an exception is noted for defendant by direction of the Court.

Mr. Warren, of counsel for the defendant, requested the learned Judge to direct the stenographer to reduce the notes of testimony and Charge to typewriting, and file the same of record in the cause, which request was granted, and the stenographer so directed.

118 The Jury rendered a verdict in favor of the plaintiff for \$13,161.78.

And thereupon the counsel for the said defendant did then and there except to the aforesaid charge and opinion of the said Court, to the action of the said Court, upon the objections made by them on behalf of the defendant and the admission of evidence offered on behalf of the plaintiff as aforesaid, and to the refusal of the defendant's points, and inasmuch as the said charge and opinion and the action of the Court as aforesaid so excepted to, do not appear upon the record:

The said counsel for the said defendant did then and there tender this Bill of Exceptions to the opinion and action of the said Court, and requested that the seal of the Judge aforesaid should be put to the same, according to the form of the statute in such case made and provided.

And thereafter on the 19th day of December, 1912, the Court entered the following order:

"And now, to wit: this 19th day of December, 1912, it is ordered that defendant's motion for new trial be refused and that judgment be entered on the verdict; and the plaintiff having presented to the Court the record in this case before the Interstate Commerce Commission and upon oral statement in open court, in the presence of counsel for the defendants as to the services performed before the Interstate Commerce Commission and in this court;

"Further ordered that counsel for plaintiffs be allowed a counsel fee of \$2,500.00 for their services in the proceedings before the Interstate Commerce Commission, and a further fee of \$2,500.00 for their services in the proceedings in this Court;

119 "Further ordered that an exception be granted to the allowance by the Court of a fee to counsel for plaintiffs for services in the proceedings before the Interstate Commerce Commission, and also to the allowance of a fee for services in this court."

And thereafter, on motion of the plaintiff, judgment was entered in favor of the plaintiff and against the defendant in said cause, in the sum of \$13,161.78.

And thereupon the aforesaid Judge, at the request of the said counsel for the defendant, did put his seal to this Bill of Exceptions, pursuant to the aforesaid statute in such cases made and provided, this 30th day of December, A. D. 1912.

JAMES B. HOLLAND. [SEAL.]

*Order of Court.*

Filed Dec. 19, 1912.

Before Holland, J.

And now, to wit: this 19th day of December, 1912, it is ordered that defendant's motion for a new trial be refused and judgment be entered on the verdict; and the plaintiff having presented to the Court the record in this case before the Interstate Commerce Commission and upon oral statement in open court in the presence of counsel for the defendant as to the services performed before the Interstate Commerce Commission and in this court.

Further ordered that counsel for plaintiff be allowed a counsel fee of Twenty-five Hundred (\$2,500) Dollars for their services in the proceedings before the Interstate Commerce Commission and 120 a further fee of Twenty-five Hundred (\$2,500) Dollars for their services in the proceedings in this court;

Further ordered that an exception be granted to the allowance by the Court of a fee to counsel for plaintiff for services in the proceedings before the Interstate Commerce Commission, and also to the allowance of a fee for services in this court.

BY THE COURT.

Attest:

GEORGE BRODBECK,  
*Deputy Clerk.*

*Præcipe for Judgment.*

Filed Dec. 19, 1912.

To the Clerk of the said Court:

Enter judgment in favor of plaintiff and against defendant in the sum of \$13,161.78 as per verdict of the jury.

WM. A. GLASGOW, JR.,  
*Attorney for Plaintiff.*

*Judgment.*

Before Holland, J.

And now, this 19th day of December, 1912, in accordance with præcipe filed judgment is hereby entered on the verdict in the above case in favor of the plaintiff and against the defendant in the sum of \$13,161.78.

BY THE COURT.

Attest:

LEO A. LILLY,  
*Deputy Clerk.*

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*Petition for Writ of Error.*

Filed Dec. 30, 1912.

The Lehigh Valley Railroad Company, the defendant in the above entitled cause, being aggrieved by the final judgment made and entered by the Court in the above entitled cause on the 19th day of December, A. D. 1912, wherein it was adjudged that the plaintiff shall recover therein against the defendant the sum of \$13,161.78, with interest from the 12th day of November, 1912, and that counsel for the plaintiff shall receive from the defendant as counsel fee for their services before the Interstate Commerce Commission in the proceeding before that Commission entitled Henry E. Meeker against Lehigh Valley Railroad Company, No. No. 3235, the sum of \$2,500, and as further counsel fee for their services before the United States District Court for the Eastern District of Pennsylvania in this cause the sum of \$2,500, comes now by its attorneys, Everett Warren, Frank H. Platt, Edgar H. Boles and John G. Johnson, and petitions the Court for an order allowing the said defendant to prosecute a writ of error from the said judgment to the Circuit Court of Appeals of the United States for the Third Circuit, in accordance with the laws of the United States in such case made and provided; and also that an order be made fixing the amount of security which defendant shall furnish upon such writ of error, and that upon giving such security all further proceedings of this Court shall be stayed until the determination of said writ of error by the said United States Circuit Court of Appeals for the Third Circuit.

And your petitioner will ever pray, etc.

EVERETT WARREN,

FRANK H. PLATT,

EDGAR H. BOLES,

JOHN G. JOHNSON,

*Attorneys for Petitioner,*

Per J. W. BAYARD.

December 27th, 1912.

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*Order of Court.*

Filed Dec. 30, 1912.

Before Holland, J.

And now, December 30th, 1912, on motion of Everett Warren, Frank H. Platt, Edgar H. Boles and John G. Johnson, attorneys for defendant,

It is ordered that a writ of error to the United States Circuit Court of Appeals for the Third Circuit from the final judgment heretofore filed and entered in the above entitled cause be and the same is hereby allowed and that a certified transcript of the record and of the proceedings herein be forthwith transmitted to the said Court.

And it is further ordered that the bond for damages and costs in said appeal be and the same is hereby fixed at \$26,323.56.

BY THE COURT.

Attest:

GEORGE BRODBECK,  
*Deputy Clerk.*

*Assignments of Error.*

Filed Dec. 30, 1912.

And now comes the defendant, Lehigh Valley Railroad Company, and files the following Assignments of Error, upon which it will rely upon its prosecution of the Writ of Error, in the above-entitled case:

1. The learned trial Judge erred in admitting in evidence the report of the Interstate Commerce Commission, dated June 8, 1911, in the proceeding before the Interstate Commerce Commission, entitled Henry E. Meeker and Caroline H. Meeker, co-partners, 123 etc., vs. Lehigh Valley Railroad Company, No. 1180. (Record p. 78.)

2. The learned trial Judge erred in admitting in evidence the order of the Interstate Commerce Commission, dated June 8, 1911, in the proceeding before the Interstate Commerce Commission, entitled Henry E. Meeker and Caroline H. Meeker, co-partners, etc., vs. Lehigh Valley Railroad Company, No. 1180. (Record p. 78.)

3. The learned trial Judge erred in admitting in evidence the testimony of the witness Henry E. Meeker as follows:

"Q. I read you the following sentence from the report of the Commission of June 8, 1911: 'We are of opinion, and so find, that defendant's rates for the transportation of coal from the Wyoming Region to Perth Amboy of \$1.55 per gross ton on prepared sizes, \$1.40 on pea coal, and \$1.20 on buckwheat coal, are unreasonable so far as they exceed \$1.40 on prepared sizes, \$1.30 on pea coal, and \$1.15 on buckwheat.' Have you made up a statement showing the amount of damage that you claim on the basis of the difference between the rates which the Commission found to be unreasonable and the rates which they prescribe as the reasonable rates on the several amounts of coal which you shipped from the period April 13, 1908, to April 13, 1910?

A. Yes.

Q. Will you please state the amount?

A. \$10,813.60." (Record, p. 81.)

4. The learned trial Judge erred in admitting in evidence the report of the Interstate Commerce Commission, dated May 7, 1912, in the proceeding pending before the Interstate Commerce Commission, entitled Henry E. Meeker against Lehigh Valley Railroad Company, No. 3235. (Record p. 88.)

5. The learned trial Judge erred in admitting in evidence the order of the Interstate Commerce Commission, dated May 7, 1912,



in the proceeding before the Interstate Commerce Commission, entitled Henry E. Meeker against Lehigh Valley Railroad Company, No. 3235. (Record p. 88.)

6. The learned trial Judge erred in charging the jury, as follows:

"In this case, Henry E. Meeker, the petitioner, has instituted suit against the Lehigh Valley Railroad Company \* \* \* upon a report of the Interstate Commerce Commission." (Record p. 111.)

7. The learned trial Judge erred in charging the jury as follows:

"The amount awarded as reparation by the Commission, as I have said, is \$12,907.18, and it is awarded on a petition presented, as I have said to you, by the plaintiff, alleging damages for an unreasonable charge for the transportation of coal over defendant's line." (Record p. 111.)

8. The learned trial Judge erred in charging the jury as follows:

"The Interstate Commerce Commission, under Section 14 of the Act, investigated the charge and found, as a conclusion, that there was an unreasonable rate charged." (Record, p. 111.)

9. The learned trial Judge erred in charging the jury as follows:

"That report was filed by the Interstate Commerce Commission on June 8, 1911." (Record p. 111.)

125 10. The learned trial Judge erred in charging the jury as follows:

"The plaintiff has offered in evidence these reports showing that the Commission investigated and found that the plaintiff was damaged by reason of unreasonable rates and awarded this amount of reparation." (Record p. 111.)

11. The learned trial Judge erred in charging the jury as follows:

"These reports are in evidence and they are made prima facie evidence of the fact by the Interstate Commerce Act." (Record p. 112.)

12. The learned trial Judge erred in charging the jury as follows:

"I instruct you that, in the absence of any countervailing evidence, either circumstantial or direct, the evidence here submitted is prima facie of the fact found in these Reports, and sufficient upon which you can base a verdict in favor of the plaintiff if you take the report as evidence as directed by law, for the amount which is claimed by the plaintiff. The amount is a total of \$13,161.78." (Record, p. 112.)

13. The learned trial Judge erred in refusing to charge the jury, as requested by the defendant in the points submitted by it, as follows:

"Upon the whole case the verdict must be for the defendant." (Record p. 113.)

14. The learned trial Judge erred in refusing to charge the jury, as requested by the defendant in the points submitted by it, as follows:

"The order and report on which the petitioner relies, both for the establishment of his case in this court and for the jurisdiction of this court in this action, are invalid, unconstitutional and void, in that they deprive the defendant of due process of law, it not being within the power of Congress to provide by legis-

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lative enactment that the Interstate Commerce Commission can make findings upon which there may be claim for a reparation of damages to a petitioner before that body, and then provide that on the trial of a suit to recover such alleged damages the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and, therefore, the verdict must be for the defendant." (Record, p. 113.)

15. The learned trial Judge erred in refusing to charge the jury as requested by the defendant in the points submitted by it, as follows:

"The order and findings of the Commission were invalid and unconstitutional, in that they have the effect to deprive the defendant of its constitutional right to a trial by jury. The order and findings assume to take from the Court its judicial powers to determine the rules of law governing the proceedings in this case, especially the rules of damages applicable to the case; and further, in effect impose upon this Court, as evidence in this case, that which is not legal evidence, and further, to impose upon this Court, as findings of the Commission, conclusions not based on findings, and, therefore, the verdict must be for the defendant." (Record p. 114.)

16. The learned trial Judge erred in refusing to charge the jury as requested by the defendant in the points submitted by it, as follows:

"The order and findings upon which the plaintiff's case rests are invalid, because on their face they purport to regulate commerce which was completed before the time when the order was made, and which, therefore, was not subject to regulation at that time, it not being within the power of Congress to provide by legislative enactment that the Interstate Commerce Commission can make findings upon which there may be a claim for a reparation of damages to a petitioner before that body, and then provide that on the trial of a suit to recover such alleged damages the findings and order of the Commission shall be prima facie evidence of the facts therein stated. The power to regulate commerce does not include the power to dispose of proceeds of past transportation transactions. The power to prescribe what shall be a reasonable charge for interstate transportation does not include the power to say what shall be done with the money collected from shippers in the past, and, therefore, the verdict must be for the defendant." (Record p. 114.)

17. The learned trial Judge erred in refusing to charge the jury as requested by the defendant in the points submitted by it, as follows:

"The award made in the reparation order is not based on the facts of fact required by the Act, as the Act requires that, in awarding damages, such reports shall include the findings of fact on which the award is made, and the report contains no finding of fact to support a conclusion that any of the rates charged the plaintiff were unreasonable, and, therefore, the verdict must be for the defendant." (Record p. 115.)

18. The learned trial Judge erred in refusing to charge the jury

as requested by the defendant in the points submitted by it, as follows:

"It appears on the face of the order and in the report that the total amount awarded by the Interstate Commerce Commission  
128 was the sum of several amounts claimed on several separate shipments of coal between April 13, 1908, and April 13, 1910, and that each such shipment was the basis of a separate cause of action. There was no finding by the Commission as to the several amounts due upon the several causes of action, and, therefore, the verdict should be for the defendant." (Record p. 115.)

19. The learned trial Judge erred in refusing to charge the jury, as requested by the defendant in the points submitted by it, as follows:

"There is no competent evidence in this case, either by way of findings or statements, or evidence of any kind, that the rates charged by the defendant railroad for transporting coal to Perth Amboy, from April 13, 1908, to April 13, 1910, were unreasonable, unjust or excessive, and, therefore, the verdict should be for the defendant." (Record p. 115.)

20. The learned trial Judge erred in refusing to charge the jury, as requested by the defendant in the points submitted by it, as follows:

"There is no competent evidence, either by way of findings or statements, or any other evidence in this case, that the petitioner was in any way damaged by the alleged imposition of unreasonable rates on the part of the railroad, and, therefore, the verdict should be for the defendant." (Record p. 116.)

21. The learned trial Judge erred in refusing to charge the jury, as requested by the defendant in the points submitted by it, as follows:

"There is no competent evidence, either by way of findings or statements, or any other evidence in this case, that the re-  
129 duced rates on which the amount of the alleged reparation is computed, were at any time between April 13, 1908, and April 13, 1910, reasonable or duly compensatory, and, therefore, the verdict should be for the defendant." (Record p. 116.)

22. The learned trial Judge erred in refusing to charge the jury, as requested by the defendant in the points submitted by it, as follows:

"The order and findings do not show that petitioner has been injured; on the contrary, they show that the award of reparation to him is a discrimination in his favor against other shippers, and a judgment in his favor would constitute such discrimination; therefore, the verdict should be for the defendant." (Record p. 116.)

23. The learned trial Judge erred in refusing to charge the jury, as requested by the defendant in the points submitted by it, as follows:

"Inasmuch as it appears that petitioner was charged and paid the correct tariff rates, according to tariffs duly filed pursuant to Section 6 of the Act, therefore, petitioner cannot recover back any

part of the freights so paid to the railroad, and, therefore, the verdict should be for the defendant." (Record p. 116.)

24. The learned trial Judge erred in refusing to charge the jury, as requested by the defendant, in the points submitted by it, as follows:

"The order and reports on which petitioner rests his case are invalid and void, because in the proceedings before the Commission, the Commission failed to give to the defendant railroad the hearing provided for in the Interstate Commerce Commission Act, 130 which said hearing the Act provides, shall be a condition precedent to the making of any valid order or findings, and, therefore, the verdict should be for the defendant." (Record p. 117.)

25. The learned trial Judge erred in refusing to charge the jury, as requested by the defendant, in the points submitted by it, as follows:

"It appears on the face of the report that the Commission drew conclusions from the evidence before it, which conclusions were controlling in the proceedings of the Commission, and were, as a matter of law, incorrect and improper conclusions, said conclusions being the conclusions as to reasonableness of rates." (Record p. 117.)

26. The learned trial Judge erred in allowing counsel for the plaintiff a fee of \$2,500 for their services to the plaintiff in the proceeding before the Interstate Commerce Commission, entitled Henry E. Meeker against Lehigh Valley Railroad Company, No. 3235. (Record p. 118.)

27. The learned trial Judge erred in allowing counsel for the plaintiff a fee of \$2,500 for their services to the plaintiff in this case. (Record p. 118.)

28. The learned trial Judge erred in entering judgment for the plaintiff upon the verdict. (Record p. 119.)

EVERETT WARREN,  
FRANK H. PLATT,  
EDGAR H. BOLES,  
JOHN G. JOHNSON,

*Attorneys for Defendant,*

Per J. W. BAYARD.

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*Bond Sur Writ of Error.*

Filed Dec. 30, 1912.

Know all men by these presents, That we, Lehigh Valley Railroad Company, as principal, and United States Fidelity and Guaranty Company, as sureties, are held and firmly bound unto Henry E. Meeker, in the full and just sum of Twenty-six Thousand Three Hundred and Twenty-three Dollars and Fifty-six Cents, to be paid to the said Henry E. Meeker, his certain attorney, executors, administrators or assigns; to which payment well and truly to be made,

we bind ourselves, our heirs, executors and administrators; jointly and severally, by these presents. Sealed with our seals and dated this 28th day of December, in the year of our Lord one thousand nine hundred and twelve (1912).

Whereas, lately at a session of the United States District Court for the Eastern District of Pennsylvania, in a suit depending in said Court between the said Henry E. Meeker, plaintiff, and Lehigh Valley Railroad Company, defendant, to September sessions, 1912, No. 2148, on the 19th day of December, 1912, a judgment was rendered against the said defendant in the sum of Thirteen Thousand One Hundred and Sixty-one Dollars and Seventy-eight Cents (\$13,161.78) in favor of said plaintiff, and the said defendant, having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said plaintiff, citing and admonishing him to be and appear at a United States Circuit Court of Appeals for the Third Circuit, to be holden at the city of Philadelphia, within thirty days.

Now, the condition of the above obligation is such, That if the said Lehigh Valley Railroad Company shall prosecute its writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of

LEHIGH VALLEY RAILROAD COMPANY, [SEAL.]

By E. B. THOMAS, *President*. [SEAL.]

Attest: D. E. BAIRD, *Secretary*. [SEAL.]

UNITED STATES FIDELITY AND GUARANTY COMPANY, [SEAL.]

By HENRY STRASS, [SEAL.]  
*Resident Vice-President.*

Attest: S. LEO HARRIS,  
*Resident Secretary*. [SEAL.]

Before Holland, J.

Approved:

By THE COURT.

Attest: GEORGE BRODBECK,  
[SEAL.] *Deputy Clerk.*

133 *Stipulation for Record on Writ of Error.*

Filed Dec. 30, 1912.

And now, this 27th day of December, 1912, it is stipulated and agreed that the record sent to the Circuit Court of Appeals on the Writ of Error allowed in the above entitled cause shall contain:

1. Docket entries;

2. Petitioner's statement of claim, with the exhibits attached thereto;
  3. Defendant's plea;
  4. Bill of Exceptions; except the exhibits attached to plaintiff's statement of claim and printed with it;
  5. Petition for writ of error and order thereon;
  6. Specifications of Error;
  7. Bond sur writ of error; and
- No other papers.

WM. A. GLASGOW, JR.,  
*Attorney for Plaintiff.*

EVERETT WARREN,  
FRANK H. PLATT,  
EDGAR H. BOLES,  
JOHN G. JOHNSON,  
*Attorneys for Defendant,*  
Per J. W. BAYARD.

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*Clerk's Certificate.*

UNITED STATES OF AMERICA,  
*Eastern District of Pennsylvania, sct:*

I, William W. Craig, Clerk of the District Court of the United States for the Eastern District of Pennsylvania, do hereby certify that the annexed and foregoing is a true and faithful copy of Pleas and Proceedings in the case of Henry E. Meeker vs. Lehigh Valley Railroad Company, No. 2148, September Session, 1912, as per præcipe filed, a copy of which is hereto annexed, now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said District Court at Philadelphia, this 30th day of January, in the year of our Lord one thousand nine hundred and thirteen, and in the one hundred and thirty-seventh year of the Independence of the United States.

[SEAL.]

WILLIAM W. CRAIG,  
*Clerk District Court U. S.*

- 135 *Certified Copy of Proceedings in Circuit Court of Appeals in  
No. 1720.*

[Seal United States Circuit Court of Appeals, Third Circuit.]

- 136 In the United States Circuit Court of Appeals for the Third  
Circuit, March Term, 1913.

No. 1720.

LEHIGH VALLEY RAILROAD Co., Plaintiff in Error,

vs.

HENRY E. MEEKER, Defendant in Error.

And afterwards, to wit, on the second and third days of April, 1913, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Hon. George Gray, Hon. Joseph Buffington, and Hon. John B. McPherson, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof;

And afterwards, to wit, on the twenty seventh day of August, 1913, come the parties aforesaid by their counsel aforesaid, and the Court now being fully advised in the premises, renders the following decision:

- 137 In the United States Circuit Court of Appeals for the Third  
Circuit, March Term, 1913.

No. 1721.

LEHIGH VALLEY RAILROAD COMPANY, Plaintiff in Error,

vs.

HENRY E. MEEKER, Surviving Partner of the Firm of Henry E. Meeker and Caroline H. Meeker, Doing Business under the Trade Name of Meeker & Company, Defendant in Error.

March Term, 1913.

No. 1720.

LEHIGH VALLEY RAILROAD COMPANY, Plaintiff in Error,

vs.

HENRY E. MEEKER, Defendant in Error.

In Error to the District Court of the United States for the Eastern  
District of Pennsylvania.

Before Gray, Buffington, and McPherson, Circuit Judges.

GRAY, *Circuit Judge*:

On September 3, 1912, Henry E. Meeker, surviving partner of the firm of Meeker & Company, defendant in error (hereinafter

called the plaintiff), instituted in the court below, under the provisions of section 16 of the Act to Regulate Commerce, a suit against the Lehigh Valley Railroad Company, plaintiff in error (hereinafter called the defendant), to recover damages alleged to have been incurred by reason of certain acts and practices of the defendant, in violation of said act, and therefore the subject of complaint by the said plaintiff before the Interstate Commerce Commission.

To the judgment obtained by the plaintiff against the defendant, this writ of error has been sued out by the latter.

In his petition in the court below, "setting forth briefly the causes for which he claims damages," plaintiff charges that the defendant company, as a common carrier, subject to the provisions of the Interstate Commerce Act, from November 1, 1900, to August 1, 1901, discriminated against his firm, in that it demanded and received from Meeker & Company greater compensation for services rendered in the transportation of anthracite coal, from the Wyoming region in Pennsylvania, to Perth Amboy, in New Jersey, than it demanded or received from another shipper for "a like and contemporaneous service in the transportation" of anthracite coal between the same points, in violation of section 2 of the Act to Regulate Commerce; and further charges that from August 1, 1901, to July 17, 1907, the defendant company demanded and received from plaintiff's firm unjust and unreasonable rates for the transportation of anthracite coal from the Wyoming region in Pennsylvania to Perth Amboy, New Jersey, in violation of said act.

In support of this charge, it is alleged in the petition, as follows: That defendant is a common carrier engaged in interstate railroad transportation between points in the states of Pennsylvania, New Jersey and New York, and is largely engaged in transporting anthracite coal for plaintiff and other shippers over its lines, from collieries in the Wyoming coal region of Pennsylvania, to Perth Amboy, in the state of New Jersey; that one of said shippers other than plaintiff is the Lehigh Valley Coal Company, a corporation of the state of Pennsylvania, engaged in the business of mining and buying anthracite coal in said Wyoming region.

Plaintiff alleges that from November 1, 1900, to August 1, 1901, the defendant company, intending to unjustly and unreasonably discriminate in favor of, and to prefer, the Lehigh Valley Coal Company to the plaintiff and other independent shippers, unlawfully charged the plaintiff with excessive and discriminatory rates on 55,257.75 tons of anthracite coal of prepared sizes, 16,689 tons of pea coal, 11,448.93 tons of buckwheat coal, and 4,926.77 tons of rice coal, shipped between the said Wyoming coal region and Perth Amboy, New Jersey, the total charges on such coal amounting to \$129,989.18, whereas, had the plaintiff been given the benefit of the rates charged by defendant for similar shipments of the said Lehigh Valley Coal Company, the total charge upon plaintiff's said shipments would have been \$11,909.33 less than the sum exacted as above during the period aforesaid, which sum, with interest thereon from August 1, 1901, was awarded by the Interstate Commerce Commis-



sion in favor of the plaintiff, in their supplemental report dated May 7, 1912, as also in their orders supplemental thereto, issued June 8 and 15, 1912, attached to said petition and marked Exhibits "A" and "B," respectively.

Plaintiff further alleges that from August 1, 1901, to July 1, 1907, the defendant charged and exacted from petitioner, over its said line of road from the Wyoming coal region, aforesaid, to Perth Amboy, at tide water in New Jersey, the following unreasonable and excessive charges upon all shipments of anthracite coal, to wit:

140 \$1.55 per ton for prepared coal, \$1.40 per ton for pea coal, \$1.25 per ton for buckwheat coal, and \$1.10 per ton for coal smaller than buckwheat coal. That from August 1, 1901, to July 1, 1907, these shipments amounted to 246,870.15 tons of prepared sizes of such coal, 106,051.09 tons of the pea size of such coal, 87,250 tons of the buckwheat size of such coal, and that the charges paid thereon amounted to \$685,375.27, at rates exceeding \$1.40 per gross ton in prepared sizes, \$1.30 on pea coal, and \$1.15 on buckwheat coal, the rates fixed by the Interstate Commerce Commission as proper and reasonable, the amount of such excess being \$58,236.45. paid by plaintiff to the defendant. That said payments were made under protest that the same were unreasonable and excessive.

The petition then recites that on July 17, 1907, plaintiff filed with the Interstate Commerce Commission a complaint, setting forth the aforesaid unreasonable and discriminatory practices and charges of defendant, to the prejudice of the plaintiff and in violation of the Act to Regulate Commerce, and praying for a hearing upon the allegations set forth in said complaint, and that the commission make an order, requiring the defendant to cease and desist from the practices aforesaid, and fixing the proper and reasonable rate for transportation of anthracite coal over defendant's line, from the Wyoming region to tidewater at Perth Amboy, and awarding complainants reparation in damages in such amount as they might have suffered loss by reason of said improper practices and charges. Defendant, being duly served with a copy of said complaint, made answer thereto, issue was joined, and the complaint regularly heard and argued by all the parties thereto, and submitted. A report was duly filed by the said commission on June 8, 1911, in Docket No. 1180, a copy of which report, with the conclusions and orders of the commission, is attached to plaintiff's petition as "Exhibit C."

141 By this report the Interstate Commerce Commission held that the charges by the defendant company to the plaintiff, between November 1, 1900, and August 1, 1901, were discriminatory, and therefore unlawful, and also that the charges of defendant company, between August 1, 1901, and July 1, 1907, were unreasonable, and the same were ordered to be discontinued, and that reasonable and proper charges for the transportation of anthracite coal over defendant's line between the points of origin and destination aforesaid, should thereafter be \$1.40 per gross ton on prepared sizes, instead of \$1.55, the rate charged, and \$1.30 on pea coal, instead of \$1.40, the rate charged, and \$1.15 on buckwheat coal, instead of \$1.20, the rate charged, and the commission held "that

reparation should be awarded upon the basis of the rates herein found to be reasonable, upon all shipments of coal by complainants from the Wyoming region to Perth Amboy, since August 1, 1901. The amount of reparation which should be awarded under our finding in this case cannot be ascertained from the exhibits now on file, and such further proceeding will be had as may be necessary to determine the amount of money due to complainants."

Plaintiff's petition further recites that a hearing was had upon the question of reparation, and that a supplemental report was filed by said commission May 7, 1912. In this report, attached to the petition and marked "Exhibit A," the commission state "that the original report in No. 1180 disposed of all the questions at issue, except the claim for reparation, and the case was held open for the purpose of securing further information regarding that feature. A further hearing has been held, and complainant has presented exhibits, showing the total number of tons of each variety of coal shipped and the amount of reparation due on such shipments. These exhibits have been examined by defendant and admitted to be correct."

They then refer to their finding in the original report, that the rates exacted by defendant from November 1, 1900, to August 1, 1901, were unjustly discriminatory and in violation of section 2 of the act, to the extent that they exceeded the rates contemporaneously charged the Lehigh Valley Coal Company under the contract then in effect between that company and the defendant, and to the further finding in said original report, that the rates in effect from August 1, 1901, to July 17, 1907, were unreasonable, to the extent that they exceeded rates of \$1.40 per gross ton on prepared sizes, \$1.30 on pea, and \$1.15 on buckwheat.

They then proceed to say that on the basis of their conclusions in the former report, and upon consideration of the evidence adduced at the hearing upon the question of reparation, they now find that, during the period from November 1, 1900, to August 1, 1901, in regard to the charges exacted from plaintiff and found to have been unjustly discriminatory, that complainant was entitled to an award of reparation in the sum of \$11,009.33, with interest thereon from August 1, 1901. And they further find, in regard to the rates exacted for coal shipped by plaintiff from August 1, 1901, to July 7, 1907, which were found unreasonable in the original report, that plaintiff is "entitled to an additional award of reparation in the sum of \$58,236.45 with interest amounting to \$27,750.64, on the individual charges comprising said sum from the dates of payment thereof to September 1, 1911, together with interest on said sum of \$58,236.45, from September 1, 1911."

Following said supplemental report, and on the same day, to wit, May 7, 1912, a so-called supplemental order was entered, which, as amended in an unimportant particular May 15, 1912, read as follows:

143 "This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved hav-

ing been had, and the commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

"It is ordered, That defendant Lehigh Valley Railroad Company be, and it is hereby authorized and required to pay unto complainant Henry E. Meeker, surviving partner of Henry E. Meeker and Caroline H. Meeker, co-partners, trading as Meeker & Company, on or before the 15th day of July, 1912, the sum of \$11,009.33, with interest thereon at the rate of 6 per cent. per annum from the 1st day of August, 1901, as reparation for unjustly discriminatory rates charged for the transportation of anthracite coal from the Wyoming coal region, in Pennsylvania, to Perth Amboy, New Jersey, which rates so charged have been found by this commission to have been unjustly discriminatory, as more fully and at large appears in and by said report of the commission.

"It is further ordered, That defendant Lehigh Valley Railroad Company be, and it is hereby authorized and required to pay unto complainant, Henry E. Meeker, surviving partner of Henry E. Meeker and Caroline H. Meeker, co-partners, trading as Meeker & Company, on or before the 15th day of July, 1912, the sum of \$58,236.45, with interest thereon at the rate of 6 per cent. per annum, amounting to \$27,750.64, upon the various individual charges comprising said sum, from the dates of payment thereof to September 1, 1911, as itemized in complainant's Exhibit 2. together with interest at the rate of 6 per cent. per annum on said sum of \$58,236.45 from September 1, 1911, as reparation for unreasonable rates charged for the transportation of various shipments of anthracite coal from the Wyoming coal region in Pennsylvania, 144 to Perth Amboy, New Jersey, which rates so charged have been found by this commission to have been unreasonable, as more fully and at large appears in and by said report of the commission."

The petition then avers that a true copy of this order of the commission was duly served upon the defendant, and demand made for payment of the sum claimed in the petition, and as set forth in the aforesaid orders of the commission and attached to the petition as Exhibits "A" and "B," but the defendant had failed and refused to pay the said sums, or any part thereof. "Wherefore," it is alleged, "petitioner has instituted this proceeding to enforce the aforesaid order, regularly and lawfully made under the Act to Regulate Commerce." (The theory of the petition thus appears to be that this is a proceeding to enforce the order of reparation made by the commission, and not a suit for the recovery of such damages as plaintiff has actually incurred by reason of the alleged unlawful acts of defendant, as found by the commission.) The court is then prayed to enter a rule upon said defendant to file a plea, answer, or demurrer to the petition within thirty days from the date of serving a copy of the same, and to fix a time and place for the trial of the cause under the provisions of the Act to Regulate Commerce.

The defendant accordingly filed, October 5, 1912, its plea of the

general issue, the bar of the statutes of limitation applicable to plaintiff's claim, and for a further plea averred that the Interstate Commerce Commission had no jurisdiction to make the findings and order of reparation which the plaintiff seeks to enforce, and that there was before the commission no substantial evidence to sustain its findings and order.

At the trial, the plaintiff put in evidence the report of the commission, dated June 8, 1911 (see Record, pp. 22-73), and the  
145 order thereon of the same date, requiring the defendant to abstain from charging or receiving its present rates for the transportation of coal so found to be unreasonable, and requiring defendant for a period of two years thereafter to maintain the rates found in said report to be reasonable. Also, the supplemental report of the commission, dated May 7, 1912, finding the reparation or damages to which the plaintiff was entitled, and the supplemental order of that date, amended by that of June 15, as hereinbefore set out, requiring the defendant to pay to plaintiff, on or before the first day of August, 1912, the sums found due as and for reparation in said supplemental report.

Save the testimony of the plaintiff (Meeker), bearing upon the charge of discrimination as to freight rates between November 1, 1900, and August 1, 1901, no evidence, other than these four papers, was offered by plaintiff at the trial. The defendant offered no testimony, except that of Mr. George W. Field, one of its counsel, who attended the hearing before the Interstate Commerce Commission and made certain calculations from Exhibits "A" and "B," offered in evidence by defendant, dividing up the shipments therein set out between different dates, to which the different statutes of limitation might apply. Plaintiff's contention was and is, that these four papers, in the absence of any evidence on the part of the defendant, made out a prima facie case in his favor and entitled him to a recovery, as damages, of the amounts awarded by the commission.

This was the view taken by the learned judge of the court below, in submitting the case to the jury, and a verdict was accordingly rendered in favor of the plaintiff for the aggregate sums awarded by the commission, as reparation, which, with interest thereon,

amounted to \$109,280.17. To the judgment thereon, this  
146 writ of error is sued out by the defendant. Certain of the assignments challenge the constitutionality of section 16 of the Act to Regulate Commerce, on the ground that its provision, that the findings and order of the commission shall be prima facie evidence of the facts therein stated, is unconstitutional, in that it confers judicial power upon an administrative commission, deprives the defendant of its property without due process of law, and denies to it its right of trial by jury; and also, on the ground that the provision of said section, conferring upon the commission authority to determine and award damages to any party complaining of the violation of the act by a common carrier and to direct such carrier to pay to the complainant before a day named the sum so awarded, and declaring that, on a trial of a suit to recover such damages, the facts stated in the findings and order of the commission shall be

prima facie evidence of the facts therein stated, is not a proper exercise of the powers given to Congress to regulate commerce. The latter point was raised before this court in the case of *Western New York & P. R. R. Co. vs. Penn Refining Co.*, 70 C. C. A. 23. We there said:

"The constitutionality of the provisions making findings of fact prima facie evidence before a jury, has been challenged by sundry assignments of error, but is, we think, beyond reasonable question. The constitutional guaranty relative to trial by jury in the courts of the United States, does not exclude legislative authority to effect convenient changes in the rules of evidence, involving no detriment to litigants."

In view of this decision, counsel for the plaintiff in error does not attempt a reargument of the question before this court. The question as to the other grounds of constitutionality, is disposed of by the view taken as to what may be the proper interpretation and application of the provisions of the statute. The questions  
147 raised by the assignments of error which are most material, relate to the submission of the reports and orders of the Interstate Commerce Commission, and to how far and in what respect the same are to be taken as prima facie evidence of facts stated by them. Also, the question whether the facts of which such reports and orders are the prima facie evidence, are sufficient, in the absence of countervailing testimony by the defendant, to maintain the plaintiff's suit and claim for damages.

This court has already, in a decision at this term, in the case of *Lehigh Valley Railroad Co. et al. vs. J. Mitchell Clark, et al.*, discussed at some length the history of the legislation embodied in the Act to Regulate Commerce, and its amendments. As we there pointed out, section 14 of the original act made it the duty of the commission to make a report in writing, which should include the findings of fact upon which the conclusions of the commission are based, together with its recommendation as to what reparation should be made to the parties found to have been injured, "and such findings so made shall thereafter, in all judicial proceedings, be deemed prima facie evidence as to each and every fact found."

Section 16 provided for the refusal or neglect "to obey any lawful order or requirement of the commission, by authorizing the commission and the party interested in such order or requirement, to apply in a summary way to a Circuit Court of the United States, sitting in equity, and empower such court, as a court of equity, to hear and determine the matter, etc. And on such hearing, the report of said commission shall be prima facie evidence of the matters therein stated. And it was provided that if it be made to appear to the court "that the lawful order or requirement of said commission,  
148 drawn in question, has been violated or disobeyed," the court may issue "a writ of injunction, or other proper process, mandatory or otherwise, to restrain the common carrier from further violation or disobedience of such order."

From the fact that it was to a court of equity alone that resort was to be had for the enforcement of an order of the commission, it

was apparent that it was only to such ministerial orders of the commission as could be enforced by a court of equity, that the act in this respect could apply, and that a recommendation or an award of damages by the commission was not such an order or requirement as could be thus enforced without a violation of the seventh amendment to the Constitution, in regard to jury trials. This consideration suggested the Act of March 2, 1889, amending section 16 of the original act by adding thereto the following:

"If the matters involved in such order or requirement of said commission are founded upon a controversy requiring a trial by jury, as provided by the seventh amendment of the Constitution of the United States, and any such common carrier shall violate or refuse or neglect to obey or perform the same, after notice, etc., \* \* \* it shall be lawful for any company or person interested \* \* \* to apply in a summary way, by petition, to the Circuit Court of the United States, sitting as a court of law, \* \* \* alleging such violation or disobedience as the case may be."

Then, after providing for a jury trial, the amendment concludes

"At the trial, the findings of fact of said commission, as set forth in its report, shall be prima facie evidence of the matters therein stated."

The distinction thus clearly made between reparation and non-reparation cases, is made still more clear in the so-called "Hepburn Act of 1906, in which section 14 was amended so as to read, as follows:

149 "That whenever an investigation shall be made by said commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the commission, together with its decision, order, or requirement in the premises; and in case damages are awarded, such report shall include the findings of fact on which the award is made."

This distinction was still further emphasized by so amending section 16 as to provide that, where, after hearing on a complaint, the commission should determine that complainant is entitled to an award of damages, it

"shall make an order, directing the carrier to pay to the complainant the sum to which he is entitled, on or before the day named. If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant \* \* \* may file in the Circuit Court of the United States for the district in which he resides, \* \* \* a petition, setting forth, briefly, the causes for which he claims damages, and the order of the commission in the premises. Such suit shall proceed in all respects like other civil suits for damages, except that, on the trial of such suit the findings and order of the commission shall be prima facie evidence of the facts therein stated."

After other provisions, the section, as amended, further provides (the italics being ours):

"If any carrier fails or neglects to obey any order of the commission, *other than for the payment of money*, and while the same is



in effect, any party injured thereby, or the commission in its own name, may apply to the circuit court in the district where such carrier has its principal operating office, \* \* \* for an enforcement of such order. Such application shall be by petition, which shall

150 state the substance of the order and the respect in which the carrier has failed of obedience, and shall be served upon the carrier in such manner as the court may direct, and the court shall prosecute such inquiries and make such investigations, through such means as it shall deem needful in the ascertainment of the facts at issue, or which may arise upon the hearing of such petition. If, upon such hearing as the court may determine to be necessary, it appears that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction, or other proper process, mandatory or otherwise."

Thus, the inherent and obvious distinction between reparation and non-reparation cases is clearly recognized by Congress. It could hardly be otherwise than that such recognition should be made. The great purposes of the act are largely accomplished by the administrative control given to the Commerce Commission over all carriers, as to Interstate Commerce, and that administrative control is made efficient by the peculiar jurisdiction of a court of equity, to which the commission or a party interested may apply for the enforcement of its orders. In such cases, the whole record of the investigation by the commission is before the court, and the only matter to be determined is that the order made by the commission is a lawful order; that is, made within the scope of the authority conferred by Congress, and upon a full hearing of the parties, with the opportunity accorded of adducing testimony and having it considered. (*I. C. C. et al. vs. Louisville & Nashville R. R. Co.*, lately decided by the Supreme Court of the United States and not yet reported.)

When we come, however, to a reparation case, we encounter at once, not the question of making efficient the orders of the commission as an administrative body, and of enforcing its proper control over Interstate Commerce, but the right of an individual plaintiff to recover compensation from the defendant for damages alleged to have been actually incurred by reason of such defendant's unlawful conduct. We are dealing not with governmental control over those engaged in a quasi public employment, but with a personal controversy, which, under our traditional institutions and constitutional system, can only be determined, as other personal controversies of the kind are determined, by a jury trial at common law.

The right to a jury trial having thus been preserved by the provisions of the act above referred to, under them "the parties are entitled," as said by us in *Western New York & P. R. R. Co. vs. Penn Refining Co.* (*supra*) "to an impartial trial by jury, so conducted as to accord to them in full measure the enjoyment of their constitutional right. The procedure contemplated by the act and, unless waived, required by the Constitution, is jury trial, accompanied



with the usual safeguards, furnished by a proper application of principles of evidence and the proper submission of the case to jury." This right of trial by jury is not granted, as of grace, by act, but is a constitutional right of which the defendant cannot be deprived. The consistency and harmony of the reparation provisions as authorized by the act, with the administrative features thereof, are, however, as pointed out by the Supreme Court in *Texas & Pac. Ry. Co. vs. Abilene Cotton Oil Co.*, 204 U. S. 426, maintained by Congress having made, in the exercise of its legislative power, to the law of evidence, the "findings and order of the commission prima facie evidence of the facts therein stated." In all other respects, a suit under the act shall proceed "like all other civil suits for damages." We cannot give less than full meaning and effect to this language. What may be the facts, or classes of facts,

152 which this provision of the act applies, must be the important question in this, as in other cases, for the determination by the court. As under the decision in the *Abilene* case, the literal language of the act, in allowing a complainant as to all matters bringing an independent common law action for damages, cannot be reconciled with the general scope of the act, or with other particular provisions thereof, a suit for damages must in all cases calling for the exercise of the discretion of the administrative and rate-regulating body, be founded upon a previous application to and investigation by the Commerce Commission, and instituted with reference to "rights recognized in or to duties imposed by the act." We think therefore, it clearly follows from the premises:

(1) That the finding of the commission as to the reasonableness or otherwise, of the rate charged by the carrier in Interstate Commerce, is an administrative function properly and constitutionally delegated by the legislative power to the commission, and is, if fully made, conclusive upon a court of equity, in which it is sought to enforce an order founded upon the same. In the language of Mr. Justice Lamar, in *I. C. C. vs. Union Pac. R. R. Co.*, 222 U. S. 541, "there was, then, under the statute nothing for the complainant to do, except to comply with the order." The lawfulness of a finding is subject to judicial inquiry only in the respects above referred to.

(2) Assuming, but not deciding, that such finding is not only an administrative conclusion by the commission, which can be enforced as such by a court of equity, but also a finding of fact having evidential value in a suit for damages, it is only prima facie evidence of such fact, and not conclusive, as it would be in a suit in equity to enforce the fixing of a reasonable rate.

153 (3) The finding by the commission that a given rate is unreasonable, while pertinent to the issue, is not necessarily decisive of the question of liability in such a case as the present, either prima facie or otherwise. No argument is needed to show that the liability of the defendant, in damages, cannot be established by the mere finding or award of the commission in regard to the same. If it could be, of course all distinction between reparation and damages cases, so carefully made in the statute, would be nugatory.

and the value of the common law trial, secured by the seventh amendment, be destroyed.

The pertinency and evidential weight and value of the facts, as to which the findings and order are *prima facie* evidence, are for the determination of the court and jury, as in other civil causes. They may or may not make out a *prima facie* case for the plaintiff. The importance of the exceptional privilege thus conferred upon the plaintiff, of not being required to prove, in the first instance, the facts found by the commission, makes it the more necessary that the court should point out to the jury what are and what are not such findings. The imperative command of section 14, that in case damages are awarded, such report shall include the findings of fact on which the award is made, evidently contemplated a distinct enumeration of such findings by the commission, with reference to their proposed use in a jury trial, and evidently with this understanding, the original rule of the commission was made, that "upon the final submission of the case to the commission, either party may submit proposed findings of fact for the consideration of the commission, which findings must embrace only the material facts of the case supposed to be established by the testimony."

No function of a trial judge in such a case could be more exigent than that of pointing out to a jury, in a case where no separate and distinct findings of fact had been made in the report of the commission, what were properly to be considered such findings. We can only reiterate what was said by us in the *Penn Refining Company* case (*supra*):

"While not expressing the opinion that findings of fact, even when mixed with incompetent matter, should in all cases be excluded, we hold that, if the same be received, the court should clearly separate and distinguish before the jury the findings of fact from the incompetent matter, and direct that the latter be disregarded. Unless this course be pursued, the parties are deprived, at least in part, of the benefits and safeguards intended to be secured to them under the constitutional guaranty of a trial by jury."

It will be remembered that the only evidence adduced by the plaintiff in support of his claim for damages at the trial, consisted of the four documents to which we have above referred, viz:

(1) The original report of the commission, dated June 8, 1911, occupies fifty printed pages of the record. In this report, the commission find that the complainants have sustained the allegation of unjust discrimination under the second section of the act, and that reparation, with interest from August 1, 1901, will be awarded on this account. At the close of their report, they find, as follows:

"After careful study of defendant's exhibits relating to tonnage and cost of movement, as well as painstaking analysis of defendant's voluminous exhibits, respecting its past and present financial condition, we are of opinion and so find that defendant's rates for the transportation of coal from the Wyoming region to Perth Amboy  
\* \* \* are unreasonable so far as they exceed"

155 a certain amount. (This finding, as defendant contends, is not a finding that the rates in effect from August 1, 1901, to

July 17, 1907, were unreasonable, but that the then present rates, as they existed at the date of the report, were unreasonable.) The opinion is then expressed that reparation should be awarded upon the basis of the rates found in said report to be reasonable.

(2) This report is followed by an order of the same date, commanding the defendant "to desist, on or before the 15th day of August, 1911, and for a period of two years thereafter, from charging or demanding its present rates, and that defendant be required to establish, on or before said date, and maintain for a period of two years thereafter, rates not in excess" of the rates therein specified.

(3) A supplemental report, made by the commission, May 7, 1912, which states that the original report disposed of all the questions at issue, except the claim for reparation, and that the case was held open for further information regarding that feature. It then states that a further hearing had been held and complainant had presented exhibits showing the total number of tons of each variety of coal shipped and the amount of reparation due on the amount of such shipments. They then say that in their original report they had found that the rates charged complainant for transportation of coal during the period from November 1, 1900, to August 1, 1901, were unjustly discriminatory to an extent named, and that the rates in effect from August 1, 1901, to July 17, 1907, were unreasonable, so far as they exceeded rates established as reasonable by the commission. This latter reference to the original report is, as claimed by the defendant, inaccurate. They then say that, on the basis of

156      their conclusions in the former report, and upon consideration of the evidence adduced at the hearing upon the question of reparation (which is nowhere set out), they find, first, the number of tons of the various sizes of coal shipped by complainant over defendant's road from November 1, 1900, to August 1, 1901, and the amount of the charges thereon, and that complainant has been damaged to the extent of the difference between the amount which he did pay and the amount he would have paid had he had the benefit of the rates applied by defendant to similar shipments of the Lehigh Valley Coal Company. Second, they find the number of tons shipped by plaintiff over defendant's road, from August 1, 1901, to July 7, 1907, and the charges paid thereon, "at the rates found to have been unreasonable;" and that complainant has been damaged to the extent of the difference between the amount which he did pay and the amount he would have paid at the rates found reasonable.

(4) By the supplemental order issued on the same day, to wit, May 7, 1912, and amended June 15, 1912, which we have heretofore quoted in extenso, the defendant is required to pay, as reparation, to the plaintiff the amount found to have been unjustly discriminatory, and also the amount charged by said defendant over and above the amounts found to be reasonable by the commission.

As to these documents thus admitted in evidence, it is apparent that the requirement of section 14, that "in case damages are awarded, such report shall include the findings of fact on which the award is made," has not been complied with by any express findings of fact in the supplemental report of May 7, 1912, in which the

award of damages against the defendant is made; that such findings of fact, if any, must be looked for in the voluminous pages of the original report filed June 8, 1911, to which reference is made in the supplemental report; and that in the said original report, 157 there are no findings of fact, as such, and they must be gathered, if gathered at all, from a mass of recited evidence, statements, opinions, and conclusions of the commission, all of which were irrelevant to an award of actual pecuniary damage.

The assignments of error are numerous, but, for the purposes of this case, we may confine our attention to those which are founded upon the admission by the court, over the objection of the defendant, of these four papers, as evidence before the jury, without discrimination on the part of the court as to the evidential value of the opinions, statements, arguments and conclusions contained therein; to those upon the failure of the court to clearly separate and distinguish, for the benefit of the jury, the findings of fact from the incompetent matter contained in such reports, and to direct that the latter be wholly disregarded; and to those founded upon the portions of the charge of the court, in which the jury are in effect told that the award of damages made by the commission against the defendant, in the orders of reparation pursuant to its report, was, in the absence of controlling testimony on the part of the defendant, binding upon the jury.

The reparation report of May 7, 1912, contains no findings of fact, but merely refers to the original report of June 8, 1911, "as disposing of all the questions at issue, except the claim for reparation," and is silent as to the information and evidence that may have been adduced before it relevant to that claim. The jury would therefore be compelled to examine that voluminous report to discover for themselves whether it contained any findings of fact bearing upon the question as to what actual damage had been suffered by the plaintiff, by reason of the unlawful conduct of the defendant. Various matters may have entered into the determination of the question, whether actual damage had been suffered by the plaintiff. 158 It is quite conceivable that, though, in the performance of its administrative function, the commission finds a certain rate to be discriminatory or unreasonable and orders such rate to be changed in that regard, no actual pecuniary damage has resulted therefrom to the particular complainant before it. As said by Mr. Commissioner Clements in a public address:

"It often happens, in the attempt at reparation for wrongs accomplished, that the party most injuriously affected has no standing in law to claim reparation, for the reason that he was not the shipper and had no dealing with the carrier—he may have been the producer, consumer, or the dealer, and yet the price at which he sold or bought may have been so affected that ultimately he had to bear the burden of the increased rate, although it was paid directly, in the first instance, by the shipper."

The injustice must be apparent, of permitting an individual shipper, after procuring, upon his complaint, a reduction of rate for the future, in the interest of the public generally, to secure for himself,

by way of reparation, the difference between the new and the old rate, which has already been charged to and paid by the consumer.

The contention of the plaintiff, sanctioned by the court below, carried to its logical conclusion, is, that the finding of an unreasonable rate and the award by the commission of damages in the precise sum representing the difference between such rate and that declared to be reasonable, constitutes a *prima facie* case against the defendant, so that the suit brought by the plaintiff is, in effect, a suit to recover a penalty in which the whole burden of proof rests upon the defendant. We are not prepared to agree that this is a suit to recover a specific penalty prescribed by law, but is a suit, as described by the statute, to recover damages, in which the causes for which

159 plaintiff claims damages must be set forth, and to be proceeded in like other civil suits for damages.

The learned counsel for the plaintiff has not pointed out in his brief, nor claimed in his oral argument that there are any findings of fact upon which the award of damages was made by the commission, except its conclusion as to the existence of a discriminatory charge between 1900 and 1901, and of an unreasonable charge between 1901 and 1907, and those findings of fact and circumstances tending to establish the same. A careful reading of the fifty pages of this report does not disclose any specific findings of fact bearing on the award of reparation, other than the undisputed tonnage shipped by complainant. The report is occupied entirely with a discussion of the evidence adduced before it, on the charges of discrimination and of unreasonableness.

Granting, however, that these papers, including this long report in which the findings of fact alone are to be looked for, were admissible, as has been already indicated, it was clearly the duty of the court below to point out such portions of the voluminous record as alone should be considered findings of fact, within the meaning of section 16 of the act. We think in this respect the court has failed to assist the jury in the proper conduct of the case, to the detriment of the defendant. It can hardly be denied that such instructions were not only due from the court to the jury, but that without them, these papers, including this voluminous report of the commission, which in itself constituted a fair sized book, should not have been admitted. The record discloses the fact that, when this report of June 8, 1911, was offered in evidence, it was objected to by the defendant, on the ground that it contained no findings of fact, as required by the statute, or which are material or relevant in a reparation suit. Counsel for plaintiff said in reply:

160 "There are certain findings of the commission in this case, if that point is made, which perhaps your Honor will have to guard in telling the jury what part of this report to consider, and I will prepare and submit to your Honor such a point for charge, striking out such points as are argumentative or historical, and confining the jury's consideration to such findings of fact as the commission may make."

Upon further objection by counsel for defendant, on the ground that

"The report contained many statements purporting to be statements of evidence in the hearing before the Interstate Commerce Commission, arguments, opinions, and conclusions, which the statute does not purport to make admissible as *prima facie* evidence,"

counsel for plaintiff said in reply:

"I would suggest—and this is only a suggestion—that your Honor say that you will control the effect of this report by a proper charge to the jury, because there are certain statements of evidence, statements of an historical character, which I think under the cases, the court should control in submitting the case to the jury, and direct their attention to the facts found in the report."

The COURT: "Then your idea is simply to offer the report in evidence, for the purpose of proving that there was an order made, and all relevant material in support of that evidence?"

COUNSEL FOR PLAINTIFF: "Yes, sir."

The COURT: "The court will, of course, indicate to the jury what of the report is relevant."

161 After this very significant colloquy the report was admitted in evidence, and afterwards, at the close of the testimony, the record states that counsel for the defendant "read to the jury what he stated to be material portions of said exhibits." It is not stated, however, in the record, what portions were so read; and we look in vain for any directions by the court to the jury in regard to this important matter.

The following extracts from the charge indicate the theory upon which the court below submitted the case to the jury, and the attitude of the court towards these reports and orders of the commission:

"It is objected here, gentlemen of the jury, that these reports made by the commission, upon which this suit is based, are not in accordance with the requirements of this act and, therefore, you should find for the defendant. But I instruct you, gentlemen of the jury, that they are, in the judgment of the court, in accordance with the requirements of this section. They state the conclusions as required by the act, and they state the findings of fact upon which the award is based, and they make that award in the sums that I have mentioned, upon sufficient findings of fact to sustain this suit."

\* \* \* \* \*

"In the presentation of this claim to the court and the jury, the Act of Congress *gives the report* a certain character as evidence. Congress, while it authorizes the Interstate Commerce Commission to investigate these alleged grievances and to ascertain whether a shipper has been injured and in what amount, and to award what, in their judgment, is a proper amount, yet requires that, if it is not paid by the defendant, the defendant shall have its day in court before a jury, for the purpose of ascertaining whether or not it is liable, as found by the Interstate Commerce Commission, in accordance with the forms of procedure directed by the Constitution.

162 But in that proceeding, the suit is *on the report* of the finding of the Interstate Commerce Commission, and their finding if made *prima facie* evidence of the correctness of the amount



*the plaintiff is entitled to recover*, and, in a suit on an award of the Interstate Commerce Commission, the plaintiff, when it comes into court, must show that there was such a complaint made before the Interstate Commerce Commission, must show what the Interstate Commerce Commission did by way of its conclusion and award, and that it has not been paid, *and that makes its prima facie* case of its right to claim." (The italics are ours.)

There is no attempt here, or elsewhere in the charge, to separate from the mass of statements in the report what might be considered findings of fact, or to instruct the jury that the statute, in making such findings *prima facie* evidence of the facts stated, leaves the evidential value of such facts to the jury. On the contrary, as will be seen in the above extracts from the charge, the court gave the jury to understand that the report and findings of the commission as to unreasonableness, and the award of damages made thereon, were *prima facie* evidence of the plaintiff's case and of the liability of the defendant, and conclusive upon the defendant, unless he could rebut the same. In this, we think the court was clearly in error. The statute, in conformity with the constitutional requirement, has provided that the defendant can only be mulcted in damages by the verdict of a jury rendered in a suit, as at common law, proceeded in "in all respects like other civil suits for damages." The statute says that such facts as are stated in the findings or order of the commission need not be proved in the suit for damages, but that such findings or order shall be *prima facie* evidence of the same, for whatever they may be worth. In other words, the statute makes the finding or order *prima facie* evidence of certain  
163 facts, but it does not make, or attempt to make, such facts *prima facie* evidence of anything.

Since the hearing and determination of this case, as also of *Lehigh Valley Railroad Co. vs. J. Mitchell Clark, et al.*, the Supreme Court has promulgated an opinion and decision in *Pennsylvania Railroad Co. vs. International Coal Mining Company*. This decision bears directly upon some of the fundamental questions involved in the case now under consideration, as it did in those involved in the *Clark* case, above referred to. On the vital point, whether in this suit, "like other civil suits for damage," actual damage must be proved, we again quote the language of Mr. Justice Lamar:

"There were many provisions of the statute for imprisonment and fines. On the civil side, the act provided for compensation—not punishment. Though the act had been held to be in many respects highly penal, yet there was no fixed measure of damage in favor of the plaintiff. But, as said in *Parsons vs. Railway*, 167 U. S. 460, construing this section (8), 'before any party can recover under the act, he must show, not merely the wrong of the carrier, but that that wrong has in fact operated to his injury.' Congress had not then and has not since given any indication of an intent that persons not injured might, nevertheless, recover what, though called damages, would really be a penalty, in addition to the penalty payable to the Government."



After referring to quite a number of cases relied upon by plaintiff, Mr. Justice Lamar says they "do not support the proposition, that damages can be recovered without proof of what pecuniary loss had been suffered as a result of the discrimination."

It hardly needs to be pointed out, as we did in the Clark case, that the ratio decidendi of the Supreme Court does not differ from that applicable to the present case. The Supreme Court also  
164 distinctly decides that, in the absence of proof of actual damage to that extent, the amount of the rebate charged and proved to have been made by defendant, cannot be recovered as damages, and that it can never be made the measure of the damage to which plaintiff is entitled. Nor more in this case can the difference between what is found by the commission to be the unreasonable tariff rate and that fixed as a reasonable one, be made the measure of the damage that the plaintiff has suffered. As pecuniary damages are neither alleged in the pleadings nor proved in the trial, the plaintiff made out no case upon which recovery of damages could be had.

For the reasons above stated, we think the judgment below should be reversed, with directions for a venire de novo.

There was a second complaint made to the Interstate Commerce Commission by defendant (Meeker), in his own name, dated April 13, 1910, pending the proceeding in his first complaint filed July 17, 1907. In the former complaint, as we have seen, the commission were dealing with the question of the unreasonableness of the rates on anthracite coal from the Wyoming region to Perth Amboy, between August 1, 1901, and July 17, 1907, whereas the second complaint dealt with the same charges or rates between July 17, 1907, the date of the filing of the first complaint, and April 13, 1910. The supplemental report of the commission, dated May 7, 1912, was a blanket report and covered both complaints. As to the later case, the report, after dealing with the former, said:

"With the exception of the reparation features, the issues involved in No. 3235 have been passed upon by the commission in No. 1180. The latter case covered the period from November 1st,

1900, to July 17th, 1907, while the instant case is designed  
165 to secure reparation upon shipments which moved between July 17th, 1907, and April 13th, 1910. The petition in the

present case, therefore, resolves itself into a prayer for reparation on shipments moving subsequent to the period covered by the original report, on basis of the conclusions announced in that report. \* \* \*

The former case was filed with the commission within one year from the passage of the law of June 29th, 1906, and consequently was not limited to causes of action that accrued within two years prior to the filing of the complaint. The present proceeding, however, was instituted more than one year subsequent to the passage of that law, and is therefore subject to the two year limitation of the statute. Complainant's prayer for reparation on shipments moving more than two years prior to the filing of the complaint in this case, must be denied.

"On basis of our decision in No. 1180, upon consideration of the

evidence submitted at the hearing of the present case regarding the amount of reparation due complainant,"

the commission find that the rates exacted by defendant during the two years prior to the filing of his last complaint, were unreasonable to the same extent as found in the report as to the former period from August 1, 1901, to July 17, 1907. The report in this latter case does not purport to include the statements and findings of the original report, or of the supplemental report in regard to the former case. It merely makes a finding of unreasonableness on the basis of their decision in No. 1180. How far it is competent for the commission to proceed upon findings and evidence in a former and distinct case, by merely referring to the same, need not now be decided. The suits in the court below, as to both cases, were tried and submitted to the jury together, upon the same instructions as to the prima facie character of the report and the award.

166 Therefore, what has been heretofore said in regard to the former case, is applicable to the latter, and need not be repeated.

The judgment, therefore, in the second case must also be reversed, with directions for a venire de novo.

The second paragraph of section 16 of the act concludes as follows:

"All complaints for the recovery of damages shall be filed with the commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit court, or state court, within one year from the date of the order, and not after; Provided, that claims accrued prior to the passage of this act may be presented within one year."

The manifest intention of Congress here, as in all statutes of limitations, was to prevent the accumulation of claims until they were stale, and to compel those who felt themselves aggrieved by the rates exacted by interstate carriers, to use due diligence in availing themselves of the remedial provisions of the act. It surely was not the intent of the amendment passed June 29, 1906, that claims prior to that date which had accrued as far back as 1887, might be presented to the commission, provided only they were so presented within one year after the passage of the amending act of 1906. The evident purpose of Congress was to cut off all claims for reparation more than two years old. In order, however, to prevent those whose accrued claims were two years old at the time of the passage of the amending act, from being taken by surprise and put at a disadvantage, as compared with those whose claims had accrued less than two years before the passage of the act, or with those whose claims having accrued after the passage  
167 of the act had full notice of the time within which they must be prosecuted, Congress gave a year's time within which claims accruing before the passage of the act might be presented to the commission. It would be a harsh construction, however, doing violence to what seems to us the evident intent of Congress, to say that, in giving this time, it did not mean to preserve

the two years' limitation, both as to claims before and after the act. We conclude, therefore, that the commission in this case had no jurisdiction to entertain a claim of the shipper accruing prior to July 17, 1905.

(Received and filed August 27, 1913. Saunders Lewis, Jr., Clerk.)

168 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1913.

No. 1720 (List No. 28).

LEHIGH VALLEY RAILROAD Co., Plaintiff in Error,

vs.

HENRY E. MEEKER, Defendant in Error.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby reversed with costs, with directions for a venire de novo.

(Signed)

GEORGE GRAY,

*Circuit Judge.*

Philadelphia, August 29, 1913.

Endorsed: No. 1720. Order Reversing Judgment Received & Filed Aug. 29, 1913. Saunders Lewis, Jr., Clerk.

169 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1913.

No. 1720.

LEHIGH VALLEY RAILROAD Co., Plaintiff in Error,

vs.

HENRY E. MEEKER, Defendant in Error.

And afterwards, to wit, on the twenty-third day of September, 1913, a petition for rehearing was filed, on behalf of Defendant in Error, upon consideration whereof the Court made the following order:

- 170 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1913.

Nos. 1720 and 1721.

LEHIGH VALLEY RAILROAD Co., Plaintiff in Error,  
vs.  
HENRY E. MEEKER, Defendant in Error.

LEHIGH VALLEY RAILROAD Co., Plaintiff in Error,  
vs.  
MEEKER & COMPANY, Defendant in Error.

Upon consideration of the petition for re-hearing filed in the above-entitled causes, it is now hereby ordered that the same be granted and that the cases be added to the present October Term List for re-argument.

(Signed)

GEORGE GRAY,  
*Circuit Judge.*

Philadelphia, October 15, 1913.

Endorsed: Nos. 1720 and 1721. Order Granting Re-hearing and directing cases placed on list for re-argument. Received & Filed Oct. 15, 1913. Saunders Lewis, Jr., Clerk.

- 171 In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1913.

No. 1720.

LEHIGH VALLEY RAILROAD Co., Plaintiff in Error,  
vs.  
HENRY E. MEEKER, Defendant in Error.

And afterwards, to wit, on the third day of December, 1913, come the parties aforesaid by their counsel aforesaid, and this case being called for re-argument sur pleadings and briefs, before the Hon. George Gray, Hon. Joseph Buffington, and Hon. John B. McPherson, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof;

And afterwards, to wit, on the nineteenth day of February, 1914, come the parties aforesaid by their counsel aforesaid, and the Court now being fully advised in the premises, renders the following decision:

172 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1913.

No. 1721.

LEHIGH VALLEY RAILROAD COMPANY, Plaintiff in Error,

vs.

HENRY E. MEEKER, Surviving Partner of the Firm of Henry E. Meeker and Caroline H. Meeker, Doing Business Under the Trade Name of Meeker & Company, Defendant in Error.

March Term, 1913.

No. 1720.

LEHIGH VALLEY RAILROAD COMPANY, Plaintiff in Error,

vs.

HENRY E. MEEKER, Defendant in Error.

*Opinion of the Court by Gray, Circuit Judge.*

173 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1913.

No. 1721.

LEHIGH VALLEY RAILROAD COMPANY, Plaintiff in Error,

vs.

HENRY E. MEEKER, Surviving Partner of the Firm of Henry E. Meeker and Caroline H. Meeker, Doing Business Under the Trade Name of Meeker & Company, Defendant in Error.

March Term, 1913.

No. 1720.

LEHIGH VALLEY RAILROAD COMPANY, Plaintiff in Error,

vs.

HENRY E. MEEKER, Defendant in Error.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

Before Gray, Buffington and McPherson, Circuit Judges.

GRAY, *Circuit Judge*:

On September 3, 1912, Henry E. Meeker, surviving partner of the firm of Meeker & Company, defendant in error (hereinafter called the plaintiff), instituted in the court below, under the pro-

visions of section 16 of the Act to Regulate Commerce, a su  
 174 against the Lehigh Valley Railroad Company, plaintiff in  
 error (hereinafter called the defendant), to recover damages  
 alleged to have been incurred by reason of certain acts and practices  
 of the defendant, in violation of said act, and therefore the subject  
 of complaint by the said plaintiff before the Interstate Commerce  
 Commission.

To the judgment obtained by the plaintiff against the defendant  
 this writ of error has been sued out by the latter.

In his petition in the court below, "setting forth briefly the cause  
 for which he claims damages," plaintiff charges that the defendant  
 company, as a common carrier, subject to the provisions of the In-  
 terstate Commerce Act, from November 1, 1900, to August 1, 1901,  
 discriminated against his firm, in that it demanded and received  
 from Meeker & Company greater compensation for services rendered  
 in the transportation of anthracite coal, from the Wyoming region  
 in Pennsylvania, to Perth Amboy, in New Jersey, than it demanded  
 or received from another shipper for "a like and contemporaneous  
 service in the transportation" of anthracite coal between the same  
 points, in violation of section 2 of the Act to Regulate Commerce,  
 and further charges that from August 1, 1901, to July 17, 1907, the  
 defendant company demanded and received from plaintiff's firm  
 unjust and unreasonable rates for the transportation of anthracite  
 coal from the Wyoming region in Pennsylvania to Perth Amboy,  
 New Jersey, in violation of said act.

In support of this charge, it is alleged in the petition, as follows:  
 That defendant is a common carrier engaged in interstate railroad  
 transportation between points in the states of Pennsylvania, New  
 Jersey and New York, and is largely engaged in transporting an-  
 thracite coal for plaintiff and other shippers over its line  
 175 from collieries in the Wyoming coal region of Pennsylvania  
 to Perth Amboy, in the state of New Jersey; that one of said  
 shippers other than plaintiff is the Lehigh Valley Coal Company,  
 a corporation of the state of Pennsylvania, engaged in the business of  
 mining and buying anthracite coal in said Wyoming region.

Plaintiff alleges that from November 1, 1900, to August 1, 1901,  
 the defendant company, intending to unjustly and unreasonably dis-  
 criminate in favor of, and to prefer, the Lehigh Valley Coal Com-  
 pany to the plaintiff and other independent shippers, unlawfully  
 charged the plaintiff with excessive and discriminatory rates of  
 55,257.75 tons of anthracite coal of prepared sizes, 16,689 tons of  
 pea coal, 11,448.93 tons of buckwheat coal, and 4,926.77 tons of rick-  
 coal, shipped between the said Wyoming coal region and Perth  
 Amboy, New Jersey, the total charges on such coal amounting to  
 \$129,989.18, whereas, had the plaintiff been given the benefit of the  
 rates charged by defendant for similar shipments of the said Lehigh  
 Valley Coal Company, the total charge upon plaintiff's said ship-  
 ments would have been \$11,909.33 less than the sum exacted as above  
 during the period aforesaid, which sum, with interest thereon from  
 August 1, 1901, was awarded by the Interstate Commerce Commis-  
 sion in favor of the plaintiff, in their supplemental report dated Ma-

7, 1912, as also in their orders supplemental thereto, issued June 8 and 15, 1912, attached to said petition and marked Exhibits "A," and "B," respectively.

Plaintiff further alleges that from August 1, 1901, to July 1, 1907, the defendant charged and exacted from petitioner, over its said line of road from the Wyoming coal region, aforesaid, to Perth Amboy, at tide water in New Jersey, the following unreasonable and excessive charges upon all shipments of anthracite coal, to wit: \$1.55 per ton for prepared coal, \$1.40 per ton for pea coal, \$1.25 per ton for buckwheat coal, and \$1.10 per ton for coal smaller than buckwheat coal. That from August 1, 1901, to July 1, 1907, these shipments amounted to 246,870.15 tons of prepared sizes of such coal, 106,051.09 tons of the pea size of such coal, 87,250 tons of the buckwheat size of such coal, and that the charges paid thereon amounted to \$685,375.27, at rates exceeding \$1.40 per gross ton in prepared sizes, \$1.30 on pea coal, and \$1.15 on buckwheat coal, the rates fixed by the Interstate Commerce Commission as proper and reasonable, the amount of such excess being \$58,236.45, paid by plaintiff to the defendant. That said payments were made under protest that the same were unreasonable and excessive.

The petition then recites that on July 17, 1907, plaintiff filed with the Interstate Commerce Commission a complaint, setting forth the aforesaid unreasonable and discriminatory practices and charges of defendant, to the prejudice of the plaintiff and in violation of the Act to Regulate Commerce, and praying for a hearing upon the allegations set forth in said complaint, and that the commission make an order, requiring the defendant to cease and desist from the practices aforesaid, and fixing the proper and reasonable rate for transportation of anthracite coal over defendant's line, from the Wyoming region to tidewater at Perth Amboy, and awarding complainants reparation in damages in such amount as they might have suffered loss by reason of said improper practices and charges. Defendant, being duly served with a copy of said complaint, made answer thereto, issue was joined, and the complaint regularly heard and argued by all the parties thereto, and submitted. A report was duly filed by the said commission on June 8, 1911, in Docket No. 1180, a copy of which report, with the conclusions and orders of the commission, is attached to plaintiff's petition as "Exhibit C."

By this report the Interstate Commerce Commission held that the charges by the defendant company to the plaintiff, between November 1, 1900, and August 1, 1901, were discriminatory, and therefore unlawful, and also that the charges of defendant company, between August 1, 1901, and July 1, 1907, were unreasonable, and the same were ordered to be discontinued, and that reasonable and proper charges for the transportation of anthracite coal over defendant's line between the points of origin and destination aforesaid, should thereafter be \$1.40 per gross ton on prepared sizes, instead of \$1.55, the rate charged, and \$1.30 on pea coal, instead of \$1.40, the rate charged, and \$1.15 on buckwheat coal, instead of \$1.20, the rate charged, and the commission held "that reparation



should be awarded upon the basis of the rates herein found to be reasonable, upon all shipments of coal by complainants from the Wyoming region to Perth Amboy, since August 1, 1901. The amount of reparation which should be awarded under our finding in this case cannot be ascertained from the exhibits now on file, and such further proceeding will be had as may be necessary to determine the amount of money due to complainants."

Plaintiff's petition further recites that a hearing was had upon the question of reparation, and that a supplemental report was filed by said commission May 7, 1912. In this report, attached to the petition and marked "Exhibit A," the commission state "that the original report in No. 1180 disposed of all the questions at issue except the claim for reparation, and the case was held open for the purpose of securing further information regarding that feature.

178 further hearing has been held and complainant has presented exhibits, showing the total number of tons of each variety of coal shipped and the amount of reparation due on such shipments. These exhibits have been examined by defendant and admitted to be correct."

They then refer to their finding in the original report, that the rates exacted by defendant from November 1, 1900, to August 1, 1901, were unjustly discriminatory and in violation of section 2 of the act, to the extent that they exceeded the rates contemporaneously charged the Lehigh Valley Coal Company under the contract then in effect between that company and the defendant, and to the further finding in said original report, that the rates in effect from August 1, 1901, to July 17, 1907, were unreasonable, to the extent that they exceeded rates of \$1.40 per gross ton on prepared size \$1.30 on pea, and \$1.15 on buckwheat.

They then proceed to say that on the basis of their conclusion in the former report, and upon consideration of the evidence adduced at the hearing upon the question of reparation, they now find that, during the period from November 1, 1900, to August 1, 1901, in regard to the charges exacted from plaintiff and found to have been unjustly discriminatory, that complainant was entitled to an award of reparation in the sum of \$11,009.33, with interest thereon from August 1, 1901. And they further find, in regard to the rates exacted for coal shipped by plaintiff from August 1, 1901, to July 17, 1907, which were found unreasonable in the original report, that plaintiff is "entitled to an additional award of reparation in the sum of \$58,236.45, with interest, amounting to \$27,750.64, on the individual charges comprising said sum, from the dates of payment thereof to September 1, 1911, together with interest on said sum of \$58,236.45, from September 1, 1911."

Following said supplemental report, and on the same day, to wit May 7, 1912, a so-called supplemental order was entered, which, amended in an unimportant particular May 15, 1912, reads as follows:

179 "This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having

been had, and the commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

"It is ordered, That defendant Lehigh Valley Railroad Company be, and it is hereby authorized and required to pay unto complainant, Henry E. Meeker, surviving partner of Henry E. Meeker and Caroline H. Meeker, co-partners, trading as Meeker & Company, on or before the fifteenth day of July, 1912, the sum of \$11,009.33, with interest thereon at the rate of six per cent. per annum from the first day of August, 1901, as reparation for unjustly discriminatory rates charged for the transportation of anthracite coal from the Wyoming coal region, in Pennsylvania, to Perth Amboy, New Jersey, which rates so charged have been found by this commission to have been unjustly discriminatory, as more fully and at large appears in and by said report of the commission.

"It is further ordered, That defendant Lehigh Valley Railroad Company be, and it is hereby authorized and required to pay unto complainant, Henry E. Meeker, surviving partner of Henry E. Meeker and Caroline H. Meeker, co-partners, trading as Meeker & Company, on or before the fifteenth day of July, 1912, the sum of \$58,236.45, with interest thereon at the rate of six per cent. per annum, amounting to \$27,750.64, upon the various individual charges comprising said sum, from the dates of payment thereof to September 1, 1911, as itemized in complainant's Exhibit 2, together with interest at the rate of six per cent. per annum on said sum of \$58,236.45 from September 1, 1911, as reparation for unreasonable rates charged for the transportation of various shipments  
180 of anthracite coal from the Wyoming coal region in Pennsylvania, to Perth Amboy, New Jersey, which rates so charged have been found by this commission to have been unreasonable, as more fully and at large appears in and by said report of the commission."

The petition then avers that a true copy of this order of the commission was duly served upon the defendant, and demand made for payment of the sum claimed in the petition, and as set forth in the aforesaid orders of the commission and attached to the petition as Exhibits "A" and "B," but the defendant had failed and refused to pay the said sums, or any part thereof. "Wherefore," it is alleged, "petitioner has instituted this proceeding to enforce the aforesaid order, regularly and lawfully made under the Act to Regulate Commerce." (The theory of the petition thus appears to be that this is a proceeding to enforce the order of reparation made by the commission, and not a suit for the recovery of such damages as plaintiff has actually incurred by reason of the alleged unlawful acts of defendant, as found by the commission.) The court is then prayed to enter a rule upon said defendant to file a plea, answer, or demurrer to the petition within thirty days from the date of serving a copy of the same, and to fix a time and place for the trial of the cause under the provisions of the Act to Regulate Commerce.

The defendant accordingly filed, October 5, 1912, its plea of the

general issue, the bar of the statutes of limitation applicable to plaintiff's claim, and for a further plea averred that the Interstate Commerce Commission had no jurisdiction to make the findings and order of reparation which the plaintiff seeks to enforce, and that there was before the commission no substantial evidence to sustain its findings and order.

181 At the trial, the plaintiff put in evidence the report of the commission, dated June 8, 1911 (see Record, pp. 22-73), and the order thereon of the same date, requiring the defendant to abstain from charging or receiving its present rates for the transportation of coal so found to be unreasonable, and requiring defendant for a period of two years thereafter to maintain the rates found in said report to be reasonable. Also, the supplemental report of the commission, dated May 7, 1912, finding the reparation or damages to which the plaintiff was entitled, and the supplemental order of that date, amended by that of June 15, as hereinbefore set out, requiring the defendant to pay to plaintiff, on or before the first day of August, 1912, the sums found due as and for reparation in said supplemental report.

Save the testimony of the plaintiff (Meeker), bearing upon the charge of discrimination as to freight rates between November 1, 1900, and August 1, 1901, no evidence, other than these four papers, was offered by plaintiff at the trial. The defendant offered no testimony, except that of Mr. George W. Field, one of its counsel, who attended the hearing before the Interstate Commerce Commission and made certain calculations from Exhibits "A" and "B," offered in evidence by defendant, dividing up the shipments therein set out between different dates, to which the different statutes of limitation might apply. Plaintiff's contention was and is, that these four papers, in the absence of any evidence on the part of the defendant, made out a prima facie case in his favor and entitled him to a recovery, as damages, of the amounts awarded by the commission.

This was the view taken by the learned judge of the court below, in submitting the case to the jury, and a verdict was accordingly rendered in favor of the plaintiff for the aggregate sums

182 awarded by the commission, as reparation, which, with interest thereon, amounted to \$109,280.17. To the judgment thereon, this writ of error is sued out by the defendant. Certain of the assignments challenge the constitutionality of section 16 of the Act to Regulate Commerce, on the ground that its provision, that the findings and order of the commission shall be prima facie evidence of the facts therein stated, is unconstitutional, in that it confers judicial power upon an administrative commission, deprives the defendant of its property without due process of law, and denies to it its right of trial by jury; and also, on the ground that the provision of said section, conferring upon the commission authority to determine and award damages to any party complaining of the violation of the act by a common carrier and to direct such carrier to pay to the complainant before a day named the sum so awarded, and declaring that, on a trial of a suit to recover such damages, the facts stated in the findings and order of the commission shall be

prima facie evidence of the facts therein stated, is not a proper exercise of the powers given to Congress to regulate commerce. The latter point was raised before this court in the case of *Western New York & P. R. R. Co. vs. Penn Refining Co.*, 70 C. C. A. 23. We there said:

"The constitutionality of the provisions making findings of fact prima facie evidence before a jury, has been challenged by sundry assignments of error, but is, we think, beyond reasonable question. The constitutional guaranty relative to trial by jury in the courts of the United States, does not exclude legislative authority to effect convenient changes in the rules of evidence, involving no detriment to litigants."

In view of this decision, counsel for the plaintiff in error does not attempt a reargument of the question before this court.

183 The question as to the other grounds of constitutionality, is disposed of by the view taken as to what may be the proper interpretation and application of the provisions of the statute. The questions raised by the assignments of error which are most material, relate to the submission of the reports and orders of the Interstate Commerce Commission, and to how far and in what respect the same are to be taken as prima facie evidence of facts stated by them. Also, the question whether the facts of which such reports and orders are the prima facie evidence, are sufficient, in the absence of countervailing testimony by the defendant, to maintain the plaintiff's suit and claim for damages.

This court has already, in a decision at this term, in the case of *Lehigh Valley Railroad Co. et al. vs. J. Mitchell Clark et al.*, discussed at some length the history of the legislation embodied in the Act to Regulate Commerce, and its amendments. As we there pointed out, section 14 of the original act made it the duty of the commission to make a report in writing, which should include the findings of fact upon which the conclusions of the commission are based, together with its recommendation as to what reparation should be made to the parties found to have been injured, "and such findings so made shall thereafter, in all judicial proceedings, be deemed prima facie evidence as to each and every fact found."

Section 16 provided for the refusal or neglect "to obey any lawful order or requirement of the commission, by authorizing the commission and the party interested in such order or requirement, to apply in a summary way to a Circuit Court of the United States, sitting in equity, and empower such court, as a court of equity, to hear and determine the matter," etc. And on such hearing, the report of said commission shall be prima facie evidence of the mat-

184 ters therein stated. And it was provided that if it be made to appear to the court "that the lawful order or requirement of said commission, drawn in question, has been violated or disobeyed," the court may issue "a writ of injunction, or other proper process, mandatory or otherwise, to restrain the common carrier from further violation or disobedience of such order."

From the fact that it was to a court of equity alone that resort was to be had for the enforcement of an order of the commission,

it was apparent that it was only to such ministerial orders of the commission as could be enforced by a court of equity, that the act in this respect could apply, and that a recommendation or an award of damages by the commission was not such an order or requirement as could be thus enforced without a violation of the seventh amendment to the Constitution, in regard to jury trials. This consideration suggested the Act of March 2, 1889, amending section 16 of the original act by adding thereto the following:

"If the matters involved in such order or requirement of said commission are founded upon a controversy requiring a trial by jury, as provided by the seventh amendment of the Constitution of the United States, and any such common carrier shall violate or refuse, or neglect to obey or perform the same, after notice, etc., \* \* \* it shall be lawful for any company or person interested \* \* \* to apply in a summary way, by petition, to the Circuit Court of the United States, sitting as a court of law, \* \* \* alleging such violation or disobedience as the case may be."

Then, after providing for a jury trial, the amendment concludes:

"At the trial, the findings of fact of said commission, as set forth in its report, shall be prima facie evidence of the matters therein stated."

185 The distinction thus clearly made between reparation and non-reparation cases, is made still more clear in the so-called "Hepburn" Act of 1906, in which section 14 was amended so as to read as follows:

"That whenever an investigation shall be made by said commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the commission, together with its decision, order, or requirement in the premises; and in case damages are awarded, such report shall include the findings of fact on which the award is made."

This distinction was still further emphasized by so amending section 16 as to provide that, where, after hearing on a complaint, the commission should determine that complainant is entitled to an award of damages, it

"shall make an order, directing the carrier to pay to the complainant the sum to which he is entitled, on or before the day named. If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant \* \* \* may file in the Circuit Court of the United States for the district in which he resides, \* \* \* a petition, setting forth, briefly, the causes for which he claims damages, and the order of the commission in the premises. Such suit shall proceed in all respects like other civil suits for damages, except that, on the trial of such suit, the findings and order of the commission shall be prima facie evidence of the facts therein stated."

After other provisions, the section, as amended, further provides (the italics being ours):

"If any carrier fails or neglects to obey any order of the commission, *other than for the payment of money*, and while the  
186 same is in effect, any party injured thereby, or the commission in its own name, may apply to the Circuit Court in the

district where such carrier has its principal operating office, \* \* \* for an enforcement of such order. Such application shall be by petition, which shall state the substance of the order and the respect in which the carrier has failed of obedience, and shall be served upon the carrier in such manner as the court may direct, and the court shall prosecute such inquiries and make such investigations, through such means as it shall deem needful in the ascertainment of the facts at issue, or which may arise upon the hearing of such petition. If, upon such hearing as the court may determine to be necessary, it appears that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction, or other proper process, mandatory or otherwise."

Thus, the inherent and obvious distinction between reparation and non-reparation cases is clearly recognized by Congress. It could hardly be otherwise than that such recognition should be made. The great purposes of the act are largely accomplished by the administrative control given to the Commerce Commission over all carriers, as to interstate commerce, and that administrative control is made efficient by the peculiar jurisdiction of a court of equity, to which the commission or a party interested may apply for the enforcement of its orders. In such cases, the whole record of the investigation by the commission is before the court, and the only matter to be determined is that the order made by the commission is a lawful order; that is, made within the scope of the authority conferred by Congress, and upon a full hearing of the parties, with the opportunity accorded of adducing testimony and having it considered. (I. C. C. 187 et al. vs. Louisville & Nashville R. R. Co., lately decided by the Supreme Court of the United States and not yet reported.)

When we come, however, to a reparation case, we encounter at once, not the question of making efficient the orders of the commission as an administrative body, and of enforcing its proper control over interstate commerce, but the right of an individual plaintiff to recover compensation from the defendant for damages alleged to have been actually incurred by reason of such defendant's unlawful conduct. We are dealing not with governmental control over those engaged in a quasi public employment, but with a personal controversy, which, under our traditional institutions and constitutional system, can only be determined, as other personal controversies of the kind are determined, by a jury trial at common law.

The right to a jury trial having thus been preserved by the provisions of the act above referred to, under them "the parties are entitled," as said by us in *Western New York & P. R. R. Co. vs. Penn Refining Co.* (supra), "to an impartial trial by jury, so conducted as to accord to them in full measure the enjoyment of their constitutional right. The procedure contemplated by the act and, unless waived, required by the Constitution, is jury trial, accompanied with the usual safeguards, furnished by a proper application of the principles of evidence and the proper submission of the case to the jury." This right of trial by jury is not granted, as of grace, by the act, but is a constitutional right of which the defendant cannot be deprived. The consistency and harmony of the reparation proceed-



ings as authorized by the act, with the administrative features thereof, are, however, as pointed out by the Supreme Court in *Texas & Pac. Ry. Co. vs. Abilene Cotton Oil Co.*, 204 U. S. 426, maintained, by Congress having made, in the exercise of its legislative power as to the law of evidence, the "findings and order of the commission prima facie evidence of the facts therein stated."

In all other respects, a suit under the act shall proceed "like all other civil suits for damages." We cannot give less than full meaning and effect to this language. What may be the facts or classes of facts, to which this provision of the act applies, must be the important question in this, as in other cases, for the determination of the court. As under the decision in the *Abilene* case, the literal language of the act, in allowing a complainant as to all matters, to bring an independent common law action for damages, cannot be reconciled with the general scope of the act, or with other particular provisions thereof, a suit for damages must in all cases calling for an exercise of the discretion of the administrative and rate-regulating body, be founded upon a previous application to and investigation by the Commerce Commission, and instituted with reference to "rights recognized in or to duties imposed by the act." We think, therefore, it clearly follows from the premises:

(1) That the finding of the commission as to the reasonableness or otherwise of the rate charged by the carrier in interstate commerce, is an administrative function properly and constitutionally delegated by the legislative power to the commission, and is, if lawfully made, conclusive. If such finding of the commission is, that a given rate charged by a carrier in interstate commerce is unreasonable, it is as if the unreasonableness of such rate were fixed by the statute. The lawfulness of such finding is subject to judicial inquiry only in the respects above referred to.

(2) The finding by the commission, that a given rate is unreasonable, while pertinent to the issue, in that it establishes a violation of the act, is not decisive of the question of liability for damages under section 8, in such case as the present, either prima facie or otherwise.

(3) The pertinency and evidential weight and value of the facts as to which the findings and order are prima facie evidence, are for the determination of the court and jury, as in other civil causes. They may or may not make out a prima facie case for the plaintiff.

The importance of the exceptional privilege thus conferred upon the plaintiff, of not being required to prove, in the first instance, the facts found by the commission, makes it the more necessary that the court should point out to the jury what are and what are not such findings. The imperative command of section 14, that in case damages are awarded, such report shall include the findings of fact on which the award is made, evidently contemplated a distinct enumeration of such findings by the commission, with reference to their proposed use in a jury trial, and evidently with this understanding, the original rule of the commission was made, that "upon the final submission of the case to the commission, either party may submit proposed findings of fact for the consideration of the commission,



which findings must embrace only the material facts of the case supposed to be established by the testimony."

No function of a trial judge in such a case could be more exigent than that of pointing out to a jury, in a case where no separate and distinct findings of fact had been made in the report of the commission, what were properly to be considered such findings. We can only reiterate what was said by us in the Penn Refining Company case (*supra*):

"While not expressing the opinion that findings of fact, even when mixed with incompetent matter, should in all cases be excluded, we hold that, if the same be received, the court should clearly separate and distinguish before the jury the findings of fact from the incompetent matter, and direct that the latter be disregarded. Unless this course be pursued, the parties are deprived, at least in part, of the benefits and safeguards intended to be secured to them under the constitutional guaranty of a trial by jury."

It will be remembered that the only evidence adduced by the plaintiff in support of his claim for damages at the trial, consisted of the four documents to which we have above referred, viz:

(1) The original report of the commission, dated June 8, 1911, occupies fifty printed pages of the record. In this report the commission find that the complainants have sustained the allegation of unjust discrimination under the second section of the act, and that reparation, with interest from August 1, 1901, will be awarded on this account. At the close of their report, they find, as follows:

"After careful study of defendant's exhibits relating to tonnage and cost of movement, as well as painstaking analysis of defendant's voluminous exhibits, respecting its past and present financial condition, we are of opinion and so find that defendant's rates for the transportation of coal from the Wyoming region to Perth Amboy \* \* \* are unreasonable so far as they exceed"

a certain amount. (This finding, as defendant contends, is not a finding that the rates in effect from August 1, 1901, to July 17, 1907, were unreasonable, but that the then present rates, as they existed at the date of the report, were unreasonable.) The opinion is then expressed that reparation should be awarded upon the basis of the rates found in said report to be reasonable.

(2) This report is followed by an order of the same date, commanding the defendant "to desist, on or before the fifteenth day of August, 1911, and for a period of two years thereafter, from charging or demanding its present rates, and that defendant be required to establish, on or before said date, and maintain for a period of two years thereafter, rates not in excess" of the rates therein specified.

(3) A supplemental report, made by the commission, May 7, 1912, which states that the original report disposed of all the questions at issue, except the claim for reparation, and that the case was held open for further information regarding that feature. It then states that a further hearing had been held and complainant had presented exhibits showing the total number of tons of each variety of coal shipped and the amount of reparation due on the

amount of such shipments. They then say that in their original report they had found that the rates charged complainant for transportation of coal during the period from November 1, 1900, to August 1, 1901, were unjustly discriminatory to an extent named, and that the rates in effect from August 1, 1901, to July 17, 1907, were unreasonable, so far as they exceeded rates established as reasonable by the commission. This latter reference to the original report is, as claimed by the defendant, inaccurate. They then say that, on the basis of their conclusions in the former report, and upon consideration of the evidence adduced at the hearing upon the question of reparation (which is nowhere set out), they find, first, the number of tons of the various sizes of coal shipped by complainant over defendant's road from November 1, 1900, to August 1, 1901, and the amount of the charges thereon, and that complainant

192 has been damaged to the extent of the difference between the amount which he did pay and the amount he would have paid had he had the benefit of the rates applied by defendant to similar shipments of the Lehigh Valley Coal Company. Second, they find the number of tons shipped by plaintiff over defendant's road, from August 1, 1901, to July 7, 1907, and the charges paid thereon, "at the rates found to have been unreasonable"; and that complainant has been damaged to the extent of the difference between the amount which he did pay and the amount he would have paid at the rates found reasonable.

(4) By the supplemental order issued on the same day, to wit, May 7, 1912, and amended June 15, 1912, which we have heretofore quoted in extenso, the defendant is required to pay, as reparation, to the plaintiff the amount found to have been unjustly discriminatory, and also the amount charged by said defendant over and above the amounts found to be reasonable by the commission.

As to these documents thus admitted in evidence, it is apparent that the requirement of section 14, that "in case damages are awarded, such report shall include the findings of fact on which the award is made," has not been complied with by any express findings of fact in the supplemental report of May 7, 1912, in which the award of damages against the defendant is made; that such findings of fact, if any, must be looked for in the voluminous pages of the original report filed June 8, 1911, to which reference is made in the supplemental report; and that in the said original report, there are no findings of fact, as such, and they must be gathered, if gathered at all, from a mass of recited evidence, statements, opinions, and conclusions of the commission, all of which were irrelevant to an award of actual pecuniary damage.

The assignments of error are numerous, but for the purposes of this case, we may confine our attention to those 193 which are founded upon the admission by the court, over the objection of the defendant, of these four papers, as evidence before the jury, without discrimination on the part of the court as to the evidential value of the opinions, statements, arguments and conclusions contained therein; to those upon the failure of the court to clearly separate and distinguish, for the benefit of the jury,

the findings of fact from the incompetent matter contained in such reports, and to direct that the latter be wholly disregarded; and to those founded upon the portions of the charge of the court, in which the jury are in effect told that the award of damages made by the commission against the defendant, in the orders of reparation pursuant to its report, was, in the absence of controlling testimony on the part of the defendant, binding upon the jury.

The reparation report of May 7, 1912, contains no findings of fact, but merely refers to the original report of June 8, 1911, "as disposing of all the questions at issue, except the claim for reparation," and is silent as to the information and evidence that may have been adduced before it relevant to that claim. The jury would therefore be compelled to examine that voluminous report to discover for themselves whether it contained any findings of fact bearing upon the question as to what actual damage had been suffered by the plaintiff, by reason of the unlawful conduct of the defendant. Various matters may have entered into the determination of the question, whether actual damage had been suffered by the plaintiff. It is quite conceivable that, though, in the performance of its administrative function, the commission finds a certain rate to be discriminatory or unreasonable and orders such rate to be changed in that regard, no actual pecuniary damage has resulted therefrom to the particular complainant before it. As said by Mr. Commissioner Clements in a public address:

194 "It often happens, in the attempt at reparation for wrongs accomplished, that the party most injuriously affected has no standing in law to claim reparation, for the reason that he was not the shipper and had no dealing with the carrier—he may have been the producer, consumer, or the dealer, and yet the price at which he sold or bought may have been so affected that ultimately he had to bear the burden of the increased rate, although it was paid directly, in the first instance, by the shipper."

The injustice must be apparent, of permitting an individual shipper, after procuring, upon his complaint, a reduction of rate for the future, in the interest of the public generally, to secure for himself, by way of reparation, the difference between the new and the old rate, which has already been charged to and paid by the consumer.

The contention of the plaintiff, sanctioned by the court below, carried to its logical conclusion, is, that the finding of an unreasonable rate and the award by the commission of damages in the precise sum representing the difference between such rate and that declared to be reasonable, constitutes a *prima facie* case against the defendant, so that the suit brought by the plaintiff is, in effect, a suit to recover a penalty in which the whole burden of proof rests upon the defendant. We are not prepared to agree that this is a suit to recover a specific penalty prescribed by law, but is a suit, as described by the statute, to recover damages, in which the causes for which plaintiff claims damages must be set forth, and to be proceeded in like other civil suits for damages.

The learned counsel for the plaintiff has not pointed out in his

brief, nor claimed in his oral argument that there are any findings of fact upon which the award of damages was made by the commission, except its conclusion as to the existence of a discriminatory charge between 1900 and 1901, and of an unreasonable charge between 1901 and 1907, and those findings of fact and circumstances tending to establish the same. A careful reading of the fifty pages of this report does not disclose any specific findings of fact bearing on the award of reparation, other than the undisputed tonnage shipped by complainant. The report is occupied entirely with a discussion of the evidence adduced before it, on the charges of discrimination and of unreasonableness.

Granting, however, that these papers, including this long report in which the findings of fact alone are to be looked for, were admissible, as has been already indicated, it was clearly the duty of the court below to point out such portions of the voluminous record as alone should be considered findings of fact, within the meaning of section 16 of the act. We think in this respect the court has failed to assist the jury in the proper conduct of the case, to the detriment of the defendant. It can hardly be denied that such instructions were not only due from the court to the jury, but that without them, these papers, including this voluminous report of the commission, which in itself constituted a fair sized book, should not have been admitted. The record discloses the fact that, when this report of June 8, 1911, was offered in evidence, it was objected to by the defendant, on the ground that it contained no findings of fact, as required by the statute, or which are material or relevant in a reparation suit. Counsel for plaintiff said in reply:

"There are certain findings of the commission in this case, if that point is made, which perhaps your Honor will have to guard in telling the jury what part of this report to consider, and I will prepare and submit to your Honor such a point for charge, striking out such points as are argumentative or historical, and confining the jury's consideration to such findings of fact as the commission may make."

196      Upon further objection by counsel for defendant, on the ground that

"The report contained many statements purporting to be statements of evidence in the hearing before the Interstate Commerce Commission, arguments, opinions, and conclusions, which the statute does not purport to make admissible as prima facie evidence,"

counsel for plaintiff said in reply:

"I would suggest—and this is only a suggestion—that your Honor say that you will control the effect of this report by a proper charge to the jury, because there are certain statements of evidence, statements of an historical character, which I think under the cases, the court should control in submitting the case to the jury, and direct their attention to the facts found in the report."

The COURT: "Then your idea is simply to offer the report in evidence, for the purpose of proving that there was an order made, and all relevant material in support of that evidence?"

COUNSEL FOR PLAINTIFF: "Yes, sir."

The COURT: "The court will, of course, indicate to the jury what of the report is relevant."

After this very significant colloquy, the report was admitted in evidence, and afterwards, at the close of the testimony, the record states that counsel for the defendant "read to the jury what he stated to be material portions of said exhibits." It is not stated, however, in the record, what portions were so read; and we look in vain for any directions by the court to the jury in regard to this important matter.

197 The following extracts from the charge indicate the theory upon which the court below submitted the case to the jury, and the attitude of the court towards these reports and orders of the commission:

"It is objected here, gentlemen of the jury, that these reports made by the commission, upon which this suit is based, are not in accordance with the requirements of this act and, therefore, you should find for the defendant. But I instruct you, gentlemen of the jury, that they are, in the judgment of the court, in accordance with the requirements of this section. They state the conclusions as required by the act, and they state the findings of fact upon which the award is based, and they make that award in the sums that I have mentioned, upon sufficient findings of fact to sustain this suit."

\* \* \* \* \*

"In the presentation of this claim to the court and the jury, the Act of Congress *gives the report* a certain character as evidence. Congress, while it authorizes the Interstate Commerce Commission to investigate these alleged grievances and to ascertain whether a shipper has been injured and in what amount, and to award what, in their judgment, is a proper amount, yet requires that, if it is not paid by the defendant, the defendant shall have its day in court before a jury, for the purpose of ascertaining whether or not it is liable, as found by the Interstate Commerce Commission, in accordance with the forms of procedure directed by the Constitution. But in that proceeding, the suit is *on the report* of the finding of the Interstate Commerce Commission, and their finding is made *prima facie* evidence of the correctness of the amount the plaintiff is entitled to recover, and, in a suit on an award of the Interstate Commerce Commission, the plaintiff, when it comes into court, must show that there was such a complaint made before the Interstate Commerce Commission, must show what the Interstate Commerce Commission did by way of its conclusion and award, and that it has not been paid, and *that makes its prima facie* case of its right to claim." (The italics are ours.)

198 There is no attempt here, or elsewhere in the charge, to separate from the mass of statements in the report what might be considered findings of fact, or to instruct the jury that the statute, in making such findings *prima facie* evidence of the facts stated, leaves the evidential value of such facts to the jury. On the contrary, as will be seen in the above extracts from the charge, the court gave

the jury to understand that the report and findings of the commission as to discrimination and unreasonableness, and the award of damages made thereon, were *prima facie* evidence of the plaintiff's case and of the liability of the defendant, and conclusive upon the defendant, unless he could rebut the same. In this, we think the court was clearly in error. The statute, in conformity with the constitutional requirement, has provided that the defendant can only be mulcted in damages by the verdict of a jury rendered in a suit, as at common law, proceeded in "in all respects like other civil suits for damages." The statute says that such facts as are stated in the findings or order of the commission need not be proved in the suit for damages, but that such findings or order shall be *prima facie* evidence of the same, for whatever they may be worth. In other words, the statute makes the finding or order *prima facie* evidence of certain facts, but it does not make, or attempt to make, such facts *prima facie* evidence of anything.

Since the hearing and determination of this case, as also of *Lehigh Valley Railroad Co. vs. J. Mitchell Clark, et al.*, the Supreme Court has promulgated an opinion and decision in *Pennsylvania Railroad Co. vs. International Coal Mining Company*. This decision, 199 U. S. 1, bears directly upon some of the fundamental questions involved in the case now under consideration, as it did in those involved in the Clark case, above referred to. On the vital point, whether in this suit, "like other civil suits for damages, actual damage must be proved, we again quote the language of Mr. Justice Lamar:

"There were many provisions of the statute for imprisonment and fines. On the civil side, the act provided for compensation—not punishment. Though the act had been held to be in many respects highly penal, yet there was no fixed measure of damage in favor of the plaintiff. But, as said in *Parsons vs. Railway*, 167 U. S. 46, in construing this section (8), 'before any party can recover under the act, he must show, not merely the wrong of the carrier, but that the wrong has in fact operated to his injury.' Congress had not thought and has not since given any indication of an intent that persons injured might, nevertheless, recover what, though called damages, would really be a penalty, in addition to the penalty payable to the Government."

After referring to quite a number of cases relied upon by plaintiff, Mr. Justice Lamar says they "do not support the proposition that damages can be recovered without proof of what pecuniary loss had been suffered as a result of the discrimination."

It hardly needs to be pointed out, as we did in the Clark case, that the ratio decidendi of the Supreme Court does not differ from that applicable to the present case. The Supreme Court also distinctly decides that, in the absence of proof of actual damage to that extent the amount of the rebate charged and proved to have been made to the defendant, cannot be recovered as damages, and that it can never be made the measure of the damage to which plaintiff is entitled. Nor more in this case can the difference between what is found



200 the commission to be the unreasonable tariff rate and that fixed as a reasonable one, he made the measure of the damage that the plaintiff has suffered. As pecuniary damages are neither alleged in the pleadings nor proved in the trial, the plaintiff made out no case upon which recovery of damages could be had.

For the reasons above stated, we think the judgment below should be reversed, with directions for a venire de novo.

There was a second complaint made to the Interstate Commerce Commission by defendant (Meeker), in his own name, dated April 13, 1910, pending the proceeding in his first complaint filed July 17, 1907. In the former complaint, as we have seen, the commission were dealing with the question of the unreasonableness of the rates on anthracite coal from the Wyoming region to Perth Amboy, between August 1, 1901, and July 17, 1907, whereas the second complaint dealt with the same charges or rates between July 17, 1907, the date of the filing of the first complaint, and April 13, 1910. The supplemental report of the commission, dated May 7, 1912, was a blanket report and covered both complaints. As to the later case, the report, after dealing with the former, said:

"With the exception of the reparation features, the issues involved in No. 3235 have been passed upon by the commission in No. 1180. The latter case covered the period from November 1, 1900, to July 17, 1907, while the instant case is designed to secure reparation upon shipments which move between July 17, 1907, and April 13, 1910. The petition in the present case, therefore, resolves itself into a prayer for reparation on shipments moving subsequent to the period covered by the original report, on basis of the conclusions  
201 announced in that report. \* \* \*

The former case was filed with the commission within one year from the passage of the law of June 29, 1906, and consequently was not limited to causes of action that accrued within two years prior to the filing of the complaint. The present proceeding, however, was instituted more than one year subsequent to the passage of that law, and is therefore subject to the two-year limitation of the statute. Complainant's prayer for reparation on shipments moving more than two years prior to the filing of the complaint in this case, must be denied.

"On basis of our decision in No. 1180, upon consideration of the evidence submitted at the hearing of the present case regarding the amount of reparation due complainant,"

the commission find that the rates exacted by defendant during the two years prior to the filing of his last complaint, were unreasonable to the same extent as found in the report as to the former period from August 1, 1901, to July 17, 1907. The report in this latter case does not purport to include the statements and findings of the original report, or of the supplemental report in regard to the former case. It merely makes a finding of unreasonableness on the basis of their decision in No. 1180. How far it is competent for the commission to proceed upon findings and evidence in a former and distinct case, by merely referring to the same, need not now be decided. The suits in the court below, as to both cases, were tried and sub-



mitted to the jury together, upon the same instructions as to the prima facie character of the report and the award. Therefore, what has been heretofore said in regard to the former case, is applicable to the latter, and need not be repeated.

The judgment, therefore, in the second case must also be reversed with directions for a venire de novo.

202 The second paragraph of section 16 of the act concludes as follows:

"All complaints for the recovery of damages shall be filed with the commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit or state court, within one year from the date of the order, and not after; Provided, that claims accrued prior to the passage of the act may be presented within one year."

The manifest intention of Congress here, as in all statutes of this kind, was to prevent the accumulation of claims until they became stale, and to compel those who felt themselves aggrieved by the wrongs exacted by interstate carriers, to use due diligence in availing themselves of the remedial provisions of the act. It surely was not the intent of the amendment passed June 29, 1906, that claims accruing prior to that date which had accrued as far back as 1887, might be presented to the commission, provided only they were so presented within one year after the passage of the amending act of 1906. The evident purpose of Congress was to cut off all claims for reparation more than two years old. In order, however, to prevent those whose claims were two years old at the time of the passage of the amending act, from being taken by surprise and put at a disadvantage, as compared with those whose claims had accrued less than two years before the passage of the act, or with those whose claims had accrued after the passage of the act had full notice of the time within which they must be prosecuted, Congress gave a year's time within which claims accruing before the passage of the act might be presented to the commission. It would be a harsh construction,

203 & 204 ever, doing violence to what seems to us the evident intent of Congress, to say that, in giving this time, it was not meant to preserve the two years' limitation, both before and after the act. We conclude, therefore, that the commission in this case had no jurisdiction to entertain a claim of the shipper accruing prior to July 17, 1905.

205 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1913.

No. 1720.

LEHIGH VALLEY RAILROAD COMPANY, Plaintiff in Error,  
vs.

HENRY E. MEEKER, Defendant in Error.

March Term, 1913.

No. 1721.

LEHIGH VALLEY RAILROAD COMPANY, Plaintiff in Error,  
vs.

HENRY E. MEEKER, Surviving Partner of the Firm of Henry E. Meeker and Caroline H. Meeker, Doing Business under the Trade Name of Meeker & Company, Defendant in Error.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

On Rehearing.

Before Gray, Buffington, and McPherson, Circuit Judges.

GRAY, *Circuit Judge*:

The able and interesting argument at the rehearing in this case has challenged the careful reconsideration by the court of the grounds upon which were based the conclusions announced in their original opinion.

206 We had already, at the same term, discussed very fully the Interstate Commerce Act of 1887, with the amendments of 1889 and 1906, relevant to the questions now presented, in the case of the Lehigh Valley Railroad Company vs. J. Mitchell Clark, et al., 207 Fed. Rep. 717. We therefore considered it unnecessary to repeat that discussion and analysis of the act and its amendments in the opinion filed in the present case, though we applied the principles of that decision thereto.

With this reference to our opinion in the Clark case, we confine ourself to what seem to us the crucial questions raised by the petition for, and argument at, the rehearing.

Premising what we have before said, that the provisions of the act, granting a right of action to shippers for damages incurred in consequence of violations of the act by the interstate carrier, while important, are incidental and not primary, in the scheme of the act for the control and regulation of the actual operation of interstate commerce, in the general interests of the public, let us again consider the nature and scope of such right, as disclosed by the language and general purposes of the statute creating it.

The learned counsel for the defendants in error, in his argument at the rehearing, contended with much insistence that the act, in denouncing unreasonable rates and creating a liability to the shipper therefor, was merely declaratory of the common law, and in support of this proposition, cites the following language in the opinion of Mr. Justice White, in the Abilene Cotton Oil case, 204 U. S. 426, 436:

“Without going into detail, it may not be doubted that, at common law, where a carrier refused to receive goods offered for carriage except upon the payment of an unreasonable sum, the shipper had a right of action in damages. It is also beyond controversy, 207 that when a carrier accepted goods without payment of the cost of carriage, or an agreement as to the price to be paid, and made an unreasonable exaction as a condition of the delivery of the goods, an action could be maintained to recover the excess over a reasonable charge. And it may further be conceded that it is now settled that, even where on the receipt of goods by a carrier, an exorbitant charge is stated, and the same is coercively exacted either in advance or at the completion of the service, an action may be maintained to recover the overcharge.”

From this it was argued that (we quote from defendant in error's supplemental brief): (1) “The measure of damage was clearly the difference between the unreasonable rate paid and the reasonable rate. (2) That all that the shipper had to establish, consequently, was the amount of the charges which he had paid, and what the reasonable charge would have been. (3) Having established these facts, the shipper was entitled, as a matter of law, to recover the difference between the two rates—that is the overcharge.” These propositions constitute the gravamen of defendant in error's whole argument.

In the case quoted from, the Supreme Court was dealing with a judgment in a state court, where suit had been brought to recover damages from the defendant company by reason of the exaction of an alleged unjust and unreasonable rate, which exceeded in the aggregate, by the sum sued for, an alleged just and reasonable charge. There had been no application to, or finding by, the Interstate Commerce Commission, in regard to the unreasonableness of the rate. Mr. Justice White conceded these common law rights of action, but proceeded to show that they were repugnant to the provisions of the

Interstate Commerce Act, which was intended “to afford an 208 effective and comprehensive means for redressing wrongs resulting from violations of the act,” and that a shipper cannot maintain an action at common law for excessive and unreasonable freight rates exacted on interstate shipments, where rates charged had been duly fixed by the carrier according to the act, and not found to be unreasonable by the commission. We think this whole opinion tends to emphasize the distinction between the common law rights of action referred to, and the right of action created and defined by the act. A situation where the rates paid were the rates fixed by the act, as the only legal rates that could be demanded or paid, even though those rates are declared afterward by the commission, in the performance of its administrative function, to be unreason-

able, differs essentially from a situation where an illegal rate is, in the first instance, coerced or extorted by the carrier. The tariff rate paid by the shipper was the legal rate, any departure from which is made by the statute a misdemeanor and punishable by fine. There is consequently no "overcharge" to be recovered as such, as in the cases cited at common law, and no coercion except that of the law. It is obvious that, even though the statute were silent as to the measure of damage applicable to the first situation, that measure could not justly be the same as in the second. That section 22 does not help the argument of the defendant in error in this respect, is shown by Mr. Justice White, when he further says:

"It is insisted that, however cogent may be the views previously stated, they should not control, because of the following provision contained in section 22 of the Act to Regulate Commerce, viz., 'Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.' This clause, however, cannot in reason be construed as continuing in shippers a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act."

We repeat that this decision of the Supreme Court so far from sustaining the contention of the defendant in error, that the Interstate Commerce Act was merely declaratory of the common law, and that the common law measure of damage was applicable to the liability created by section 8 of the act, clearly distinguishes the liability at common law, as it existed in the cases cited by Mr. Justice White, from that created by the act for every violation of its provisions. We turn to the pertinent provisions of the act.

After requiring that all charges by common carriers for transportation shall be just and reasonable, and inhibiting unjust and unreasonable charges for such service, prohibiting rebates and unreasonable preferences, and declaring the same to be unlawful, the statute, in section 8 thereof, and there alone, creates the liability with which we are here concerned. We again quote from that section:

"That in case any common carrier, subject to the provisions of this act, shall do \* \* \* any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act \* \* \* in this act required to be done, such common carrier *shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act.*" (The italics are ours.)

The learned counsel for the defendant in error seems to argue that this statute creates a general liability, independent of any relativity, limitation or qualification, as soon as a violation of the act is shown.

That this is not so, is apparent. It is not a general liability that is imposed by the act, but a particular liability to the person injured "for the full amount of damages sustained in consequence of any violation of the provisions of the act." The liability thus defined is the only civil liability anywhere imposed, and no other or different civil liability can attach itself to any violation

of the act. The liability thus imposed being the same for all violations of the law, without exception, that liability, as defined by the statute, is to the "person or persons injured for the full amount of damages sustained in consequence of any such violation of the provisions of this act." We cannot avoid the plain and exigent meaning of this language. It is impossible, in view of it, to attribute to Congress an intention to apply it to only a portion of the offenses against the act.

The logic of the situation, as recognized by the decisions of the Supreme Court in the Abilene and other recent cases, would seem to be, that a civil suit for damages may be brought under sections 8 and 9 in the District Court of the United States, for any violation of the act; that, if the violation be a simple disobedience of a specific requirement of the statute, whether of omission or commission—such, for instance, as giving a rebate—nothing more is required than to prove that specific act, and no finding of the commission is necessary to the jurisdiction of the court; but, where the illegality of the act charged depends upon whether it be reasonable or unreasonable, the option given by section 9 cannot be literally interpreted, as the determination of this issue calls for an exercise of the discretion of the administrative body. When that administrative function has been performed, and the rate complained of has been found to be unreasonable or unjust, such finding is conclusive, whether it relate

to past or present rates or practices. As said by Mr. Justice Lamar, it is as if the reasonable rate or practice was established in the statute itself. It would then only be necessary to prove in court this finding of the commission, that such a specific act or practice was unreasonable, and therefore unlawful under the act, just as it was only necessary, without any finding of the commission to that effect, to show that a specific rebate has been given that was declared unlawful by the act itself. The further procedure in the case supposed, as indicated by the act, must be in all respects "like other civil suits for damages," except that the plaintiff may, in proving his pecuniary loss or damage, in consequence of a violation of the act by the defendant, use the facts stated in any finding or order of the commission in support of his claim, without further proof of such facts, supplementing the same by other evidence as, in his judgment, the exigence of the case may require.

Referring to a contention in the International Coal Company case, that a suit for damages, occasioned by rebating, could not be maintained without preliminary action by the commission, Mr. Justice Lamar, in the recent Mitchell Coal Company case, said:

"This contention was overruled, and it was held that, for doing an act prohibited by the statute, the injured party might sue the carrier without previous action by the commission, because the courts could apply the law prohibiting a departure from the tariff to the facts of the case. But where the suit is based upon unreasonable charges or unreasonable practices there is no law fixing what is unreasonable and therefore prohibited. In such cases the whole scope of the statute shows that it was intended that the commission and not the courts should pass upon that administrative question. When

such order is made it is as though the law for that particular practice had been fixed, and the courts could then apply that order, not to one case, but to every case—thereby giving every shipper equal rights and preserving uniformity of practice. Section 9 gives the plaintiff the option of going before the commission or the courts for damages occasioned by a violation of the statutes. But since the commission is charged with the duty of determining whether the practice was so unreasonable as to be a violation of the law, the plaintiff must, as a condition to his right to succeed, produce an order from the commission that the practice or the rate was thus unreasonable and therefore illegal and prohibited.”

From this illuminating view of the requisite procedure under the act, harmonizing as it does its different provisions and “giving every shipper equal rights and preserving uniformity of practice,” it would seem that all other shippers than the complainant might bring their several actions in the District Court, “for the full amount of damages sustained in consequence of” the same violation of the act, without any further finding by the commission. It having once been established what particular conduct or practice of the carrier was illegal, it would only be incumbent on a plaintiff to show the damage, if any, sustained thereby. No award of reparation, therefore, would be necessary in such cases to the jurisdiction of the court, the suits being cognizable under sections 8 and 9, as in the case of suits for damages occasioned by rebates or other specific violations of the act.

From this it seems irresistibly to follow, that all shippers prosecuting suits for damages “sustained in consequence of any violation of the provisions of the act,” are on the same footing, whether the violation be a specific act made illegal by the statute, or one in which the illegality of the act depends upon the finding of fact by the commission, that the act or practice complained of is unreasonable or unjust. In like manner it follows that the measure of damages sustained by a shipper in consequence of any violation of the act, must be the same in all cases. We find no authority in the act itself, or in the decisions of the Supreme Court, for applying a different measure of damage in the case of any violation of the act, than that established by the eighth section, viz., “the full amount of damages sustained” by reason thereof. To hold that, in one case actual damage must be proved, and in the other not, introduces a confusion in the administration of the law, for which the only justification must be the express and mandatory requirement of the statute, or the express and controlling decision of the Supreme Court. The measure of the statute is thus stated by the Supreme Court in the International Coal Mining case:

“The statute gives a right of action for damages to the injured party, and by the use of these legal terms clearly indicated that the damages recoverable were those known to the law and intended as compensation for the injury sustained. It is elementary that, in a suit at law both the fact and the amount of damage must be proved. And although the plaintiff insists that in all cases like this the fact and amount of the pecuniary loss is matter of law, yet this conten-



tion is not sustained by the language of the act, nor is it well founded in actual experience, as will appear by considering several usual and every-day instances suggested by testimony in this record."

This statement of the Supreme Court is general, and is applicable to any and all cases where damages are sought by one claiming to have been injured by a violation of the act. It would seem to dispose of the contention of the defendants in error, referred to above and approved by the court below, that "the shipper was entitled as matter of law to recover the difference between the two rates," that is, the tariff rate charged to the shipper, and the lower rate found to be reasonable by the commission. Herein is the essential

214 vice of defendant in error's argument, that the fact and amount of pecuniary loss in a case like the present, is matter of law, and not of fact to be determined by the jury. It does not help the matter that the defendants in error argue that the rate charged having been conclusively found by the commission as unreasonable, the award of the difference between that rate and the rate found to be reasonable is only prima facie evidence of the liability of defendant for the amount so awarded. The act makes nothing prima facie evidence of the liability created by section 8. The prima facies mentioned in section 16 is attached to the facts stated in the finding and order of the commission, which facts may or may not be sufficient to establish that liability.

Section 16 of the original act has been so amended as to meet the objection that was made soon after its enactment, that in reparation cases, the order of the commission could not be enforced by a summary proceeding in a court of equity, as administrative orders were enforced, and that the liability for the damages actually sustained by a shipper, by reason of a violation of the law, could, conformably to the seventh amendment of the Constitution, only be enforced, as are other liabilities of that kind, by a suit at common law. This recognition by Congress of the necessity of conforming to the requirements of the seventh amendment, is, of course, inconsistent with any interpretation of the ninth section, from which it could be inferred that a person claiming to be damaged by any common carrier might "elect" to pursue his claim for damages before the commission, as his final and efficient remedy, and procure an award for the payment of the same, enforceable as such in a court of law, as an administrative order is enforceable in a court of equity. The

215 successive amendments by which section 16 was brought into its present shape, attest the earnest purpose of Congress to meet the situation. Suits to enforce the liability created by section 8 were made available to the person injured in all cases, not only where the violation of the statute was an act or practice denounced as illegal by the law itself, but also where such act or practice was only made illegal by the finding of the commission.

Sections 13 and 15 having provided that the commission was authorized, either upon complaint or upon its own initiative, to declare, upon investigation, any rates or practices unjust or unreasonable, section 16 provided for a case where, after the complaint and investigation, an award, or, as it was called in the original act, a



recommendation, of damages was made by the commission. If not complied with by the defendant within a time specified, the complainant was authorized to file in a Circuit (District) Court of the United States, or in any state court of general jurisdiction, a petition setting forth briefly the causes for which he claims damages and the order of the commission in the premises. "Such suit in the Circuit Court of the United States shall proceed in all respects like other civil suits for damages." This is in effect authorizing in the special case described a common law suit for damages, as contemplated by sections 8 and 9, in all cases where damages are claimed consequent upon a violation of the law.

It is true, that the law makes an exception to the ordinary rule of evidence in such cases, by providing that facts stated in the findings or order of the commission need not again be proved by the plaintiff, the finding and order being made *prima facie* evidence of such facts. Such facts may or may not be relevant to the question of the liability for, or amount of, damages claimed. Their evidential value in this respect is for the court and jury trying the case. This

216 *prima facie* of the facts found is an advantage of considerable moment to the plaintiff. It is an expressed exception to the ordinary rule of evidence, and should not be extended by implication. It must be confined to the precise meaning of the language of its enactment. If the intent of the legislative mind had been to go further and make, not only the findings of fact and order *prima facie* evidence of the facts stated, but also the conclusions of the commission on facts, *prima facie* evidence of the liability of the defendant for the amount of damages stated in the award, such intent should and would have found expression in the act. We are not to impute to Congress such an intention so violative of the fundamental rights of the parties to a suit at common law, and of the express guaranty of the Constitution in that regard. If more were wanted, we might refer to the language of section 14, which emphasizes the distinction between the "conclusions" of the commission and "the findings of fact on which the award is made."

The distinction between reparation and non-reparation cases, so anxiously made by Congress, in order to conform to the spirit of the seventh amendment, would be practically nullified, if, in prosecuting a suit for damages actually sustained by reason of a violation of the law, the liability for such damages, and the amount thereof, as found by the commission, must be conceded in the first instance. Is a defendant to be called upon, practically to prove a negative, and show that the plaintiff was not damaged, or that the amount claimed was less than that stated by the commission? These facts, or the facts upon which they depend, are all peculiarly within the knowledge of the plaintiff, and it is fundamental that neither party to a suit should be required to prove or disprove what is peculiarly within the knowledge of the opposite party.

217 Unwarranted as this contention may be, that the findings and order of the commission are *prima facie* evidence, not only of the facts therein stated, but of the conclusions of the commission in regard to the very subject-matter in litigation, it

is also still more unjust in these cases, because if sustained, it practically and substantially makes the award of the commission, not only *prima facie*, but conclusive evidence of the plaintiff's case.

The theory of the case, as presented by the defendants in error in their pleadings, as well as at the trial, and adopted by the court below, is that the suit was brought upon the award, *qua* award, instead of having been brought "to enforce a cause of action given by this section (section 8) to any person injured." It was brought "to recover what, though called damages, would really be a penalty." In accordance with this theory, plaintiff's contention logically follows that, when the commission finds that the rates charged were unreasonable, and what the reasonable charge should have been, the establishment of these facts entitles the shipper, as matter of law, to recover the difference between the two rates. In the present case, we have the unquestioned finding of the commission, that the rates charged were unreasonable, and that a certain lower rate was reasonable, and the difference between the two was expressly and avowedly awarded as damages to the plaintiff. Defendants in error contend and the court below states that the so-called facts, when shown at the trial, constitute a *prima facie* case for the plaintiff. If, however, the difference between the two rates is, as matter of law, the measure of damage sustained by the plaintiff, it is not only *prima facie* but conclusive evidence upon court and jury of the injury of the plaintiff and of the amount of damage to which he is entitled. Grant the premise, that plaintiff is entitled to recover, as matter of

law, the difference between a reasonable and unreasonable  
 218 rate found by the commission, and that the suit is for the recovery of that difference, as awarded by the commission the logical conclusion is, as stated by the defendants in error and the court below. This "logical conclusion," however, is a *reductio ad absurdum*, and therefore shows the falsity of the premises upon which it is founded.

Congress admittedly, by its successive amendments to the Act of 1887, sought to conform to the requirement of the seventh amendment, by providing that, where the matters involved were founded upon a controversy requiring a trial by jury, such a trial should be accorded. Can it be doubted that the parties, therefore, are entitled to a real trial by jury, so conducted as to accord to them in full measure the enjoyment of their constitutional right? If so, how wide of the truth is the contention that this right has been enjoyed by the defendant in the present suit?

We have already quoted one form in which the theory of the case is stated by the plaintiff below. In another place in his supplemental brief, it is thus stated:

"At common law, a shipper who had been charged unreasonable rates could recover the overcharge; and, under the statute, as soon as the commission had determined that there had been an overcharge, the shipper could recover in the same way, although, of course on the trial the carrier was at liberty to disprove, if it could, the fact of the overcharge established *prima facie* by the finding and order of the commission."

The "overcharge," as has been before stated in the same brief, can be nothing else than the difference between the reasonable and the unreasonable or tariff rate. How can the carrier be said to be "at liberty" to disprove that arithmetical fact? This difference, according to the theory of the court below,—though its payment has neither been "extorted" or "coerced," except by the law—is 219 the damage to which the plaintiff is entitled as a matter of law. Though stated to be *prima facie*, it is really, according to that theory, conclusive as to the injury of the plaintiff and the amount of his damage.

We need only for a moment compare this theory of a suit for damages with that which is established by the act itself. The sixteenth section nowhere says that the report, findings or order of the commission are *prima facie* evidence of the liability of the defendant, or of the amount of such liability. It only says, and we must again recur to its exact language, that the findings and order of the commission "shall be *prima facie* evidence of the facts therein stated." But clearly, such facts are not made *prima facie* evidence of anything. Their evidential value is for the court and jury to determine. They may or may not be sufficient to make a *prima facie* case, or they may, in the opinion of the court or jury, be of any other greater or less degree of probative force. These facts can be no other than those referred to in the fourteenth section, where it provides that, after an investigation, the committee shall make a report, "which shall state the conclusions of the commission, together with its decision, order, or requirement in the premises; and in case damages are awarded, such report shall include the findings of fact on which the award is made."

In view of this, it would seem almost an abuse of language to say that the "facts," of which the findings and order of the commission are *prima facie* evidence, include the conclusions arrived at by the commission, as to the injury of the plaintiff and the amount of damages sustained. The measure of damage is not fixed by the statute to be the difference between a reasonable and an unreasonable rate, as a matter of law or otherwise. On the contrary, the eighth section

220 declares that the "common carrier" in this case, as in all others, "shall be liable to the person or persons injured for the full amount of damages sustained in consequence of any violation of the provisions of the act." What those damages may be, is a question of fact to be determined by the jury, and not a question of law. That is distinctly decided by the Supreme Court in the *International Coal Mining* case. This is the measure of damage established by the act itself, and must be conformed to in a case like the present. The language of the eighth section makes the measure of damage therein prescribed applicable to every violation of the act. Nor has the Supreme Court in any case decided otherwise. Its reasoning as to the measure of damages established by the eighth section, is also applicable to every violation of the act,—to one that depends for its illegality upon a finding of the commission, as well as to one where such finding is unnecessary. The argument to the contrary is largely technical, and tends to make a mockery of the right to a jury trial and to defeat the just purposes of the act in that respect.

We conclude by quoting again the language of the Supreme Court in the International Coal Company case, after referring to what was said by that court in *Parsons vs. Railway*:

"Congress had not then and has not since, given any indication of an intent that persons not injured might nevertheless recover what, though called damages, would really be a penalty, in addition to the penalty payable to the Government."

Our opinion, therefore, already filed, with certain modifications in the text thereof, will stand as the opinion of the court in this regard.

For obvious reasons, we have made no distinction between the count for the recovery of damages for discriminatory rates and that for unreasonable rates, and therefore have not referred to the former in the plaintiff's petition, complaining of discriminations alleged to have been practiced by the plaintiff in error during the period from November, 1900, to August, 1901, although the counsel for defendants in error says in his brief at the rehearing: "There is a wide distinction between the two causes of action."

But it is argued that, inasmuch as, upon application of the plaintiff, a discrimination was found by the commission to have been practiced by the defendant, and reparation therefor awarded, in the amount of the difference between the tariff rate charged and the low rate collected from other shippers, that award was *prima facie* evidence of the damage sustained by the plaintiff. So that, according to this argument, even in rebate cases there is a class, consisting of those in which the commission has intervened and made an award to which the measure of damage established by section 8 for every violation of the law, does not apply.

Defendants in error also urge that this court was in error in its interpretation of the second paragraph of section 16 of the act, providing that "All complaints for the recovery of damages shall be filed with the commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit court or state court within one year from the date of the order, and not after; Provided, that claims accrued prior to the passage of this act may be presented within one year."

We have carefully reconsidered the opinion we have already expressed as to this provision of the sixteenth section of the act, in the light of the able argument of counsel for defendants in error. We are not convinced, however, that we have misconceived the true meaning and spirit of that provision, and therefore adhere to our judgment, that the court below was in error in instructing the jury that "there is no statute of limitation which bars the recovery of the plaintiff for either of the amounts presented in this suit." The assignments of error in this respect, therefore, must be sustained, and for these reasons and those heretofore stated, the judgment below must be reversed, and a *venire de novo* awarded.

(Received and filed February 19, 1914. Saunders Lewis, Jr. Clerk.)

223 In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1913.

No. 1720 (List No. 71).

LEHIGH VALLEY RAILROAD Co., Plaintiff in Error,

vs.

HENRY E. MEEKER, Defendant in Error.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby reversed, with costs, and a venire de novo awarded.

(Signed)

JOHN B. McPHERSON,

*Circuit Judge.*

Philadelphia, February 19, 1914.

Endorsed: No. 1720. Order Reversing Judgment. Received & Filed Feb. 19, 1914. Saunders Lewis, Jr., Clerk.

224 UNITED STATES OF AMERICA,  
*Eastern District of Pennsylvania,*  
*Third Judicial Circuit, act:*

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be a true and faithful copy of the original transcript of record and proceedings in this court in the case of Lehigh Valley Railroad Co., Plaintiff in Error, vs. Henry E. Meeker, Defendant in Error, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this tenth day of March, in the year of our Lord one thousand nine hundred and fourteen, and of the Independence of the United States the one hundred and thirty-ninth.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,

*Clerk of the U. S. Circuit Court of Appeals, Third Circuit.*

225 UNITED STATES OF AMERICA, *ss.*:

The President of the United States of America to the Honorable Judges of the United States Circuit Court of Appeals for the Third Circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit which Lehigh Valley Railroad Company is plaintiff in error and Henry E. Meeker is defendant in error, No. 1720, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Eastern District of Pennsylvania, and we, being willing for certain reasons that the said cause and the record and proceedings therein should

be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-ninth day of April, in the year of our Lord one thousand nine hundred and fourteen.

JAMES D. MAHER,

*Clerk of the Supreme Court of the United States*

227 [Endorsed:] File No. 24,152. Supreme Court of the United States, No. 1001, October Term, 1913. Henry E. Meeker vs. Lehigh Valley Railroad Company. Writ of Certiorari granted.

228 In the United States Circuit Court of Appeals for the Third Circuit.

HENRY E. MEEKER

vs.

LEHIGH VALLEY RAILROAD COMPANY.

It is hereby agreed and stipulated between counsel for the plaintiff-in-error and the defendant-in-error in the above case, that the certified copy of the record therein from the Circuit Court of Appeals be presented to the Supreme Court with the petition for certiorari, and not be taken as a return to the writ of certiorari, instead of requiring the certification to the Supreme Court of another transcript of the record.

Dated at Philadelphia, Pa., this first day of May, 1914.

(Signed) By HENRY E. MEEKER,  
WM. A. GLASGOW, JR., *Attorney*  
LEHIGH VALLEY RAILROAD  
COMPANY,

(Signed) By JOHN G. JOHNSON, *Attorney*,  
Per J. W. BAYARD.

Endorsed: No. 1720. Stipulation. Received & Filed May 1914. Saunders Lewis, Jr., Clerk.

229 UNITED STATES OF AMERICA,  
*Eastern District of Pennsylvania,*  
*Third Judicial Circuit, et:*

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be a true and faithful copy of the original stipulation of counsel filed as to return to writ of certiorari to the Supreme Court of the United States, in the case of Henry E. Meeker, vs. Lehigh Valley Railroad Company, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this seventh day of May, in the year of our Lord one thousand nine hundred and fourteen, and of the Independence of the United States the one hundred and thirty-ninth.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,  
*Clerk of the U. S. Circuit Court of Appeals, Third Circuit.*

230 [Endorsed:] File No. 24,152. Supreme Court U. S., October Term, 1914. Term No. 435. Henry E. Meeker, Petitioner, vs. Lehigh Valley Railroad Company. Writ of certiorari and return. Filed May 8, 1914.



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**SUPREME COURT OF THE UNITED STATES**

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No.

October Term, 1913.

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**HENRY E. MEEKER**, Surviving Partner of the firm of  
**HENRY E. MEEKER and CAROLINE H. MEEKER**,  
doing business under the trade name of **MEEKER &  
COMPANY**,

*Petitioner and Defendant-in-Error,*  
*vs.*

**LEHIGH VALLEY RAILROAD COMPANY**,  
*Respondent and Plaintiff-in-Error.*

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**HENRY E. MEEKER**,  
*Petitioner—Defendant-in-Error,*  
*vs.*

**LEHIGH VALLEY RAILROAD COMPANY**,  
*Respondent—Plaintiff-in-Error.*

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**Petition for Writs of Certiorari to be ad-  
dressed to the Judges of the United States  
Circuit Court of Appeals for the Third Cir-  
cuit.**

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**WM. A. GLASGOW, JR.,**  
**JOHN A. GARVER,**  
*Attorneys for Petitioner.*

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IN THE  
Supreme Court of the United States.

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No. .... October Term, 1913.

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HENRY E. MEEKER, Surviving Partner of the firm  
of Henry E. Meeker and Caroline H. Meeker, do-  
ing business under the trade name of Meeker &  
Company,

*Petitioner and Defendant-in-Error,*

*vs.*

LEHIGH VALLEY RAILROAD COMPANY,  
*Respondent and Plaintiff-in-Error.*

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HENRY E. MEEKER,

*Petitioner—Defendant-in-Error,*

*vs.*

LEHIGH VALLEY RAILROAD COMPANY,  
*Respondent—Plaintiff-in-Error.*

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**PETITION FOR WRITS OF CERTIORARI TO BE  
ADDRESSED TO THE JUDGES OF THE  
UNITED STATES CIRCUIT COURT OF AP-  
PEALS FOR THE THIRD CIRCUIT.**

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Your petitioner, Henry E. Meeker, Surviving  
Partner, etc., respectfully shows:

I. That the questions in the decision of the above cases in the Circuit Court of Appeals for the Third Circuit, involved only the proper construction to be given to the Act to Regulate Commerce and the provisions thereof, as to the recovery of reparation or damages awarded by an order or orders of the Interstate Commerce Commission.

II. On the 17th day of July, 1907, Meeker, Petitioner here in the first case above, (defendant-in-error), filed his petition as complainant before the Interstate Commerce Commission, charging:

(a) That the defendant, the Lehigh Valley Railroad Company, unjustly discriminated against the complainant in the rates charged to him for the transportation of coal from the Wyoming Region of Pennsylvania to Perth Amboy, New Jersey, during the period from November 1st, 1900, to August 1st, 1901.

(b) That the defendant charged and collected from the complainant unreasonable rates for the transportation of coal from the Wyoming Region of Pennsylvania to Perth Amboy, New Jersey, during the period from August 1st, 1901 to July 17th, 1907; and the complainant prayed that the Commission might enter an order requiring the defendant to cease and desist from the unjust discrimination alleged, and from charging the complainant unreasonable rates for the transportation aforesaid, and award to complainant reparation or damages for the wrongs suffered by him.

III. The Commission made an exhaustive investigation, extending over a period of four years, hear-

ing the evidence (over 3000 pages), submitted both by the complainant and the defendant, and on the 8th day of June, 1911, filed its report (Record, p. 24), and on May 7th, 1912, filed its supplemental report (Record, p. 15), which said report and supplemental report stated "the conclusions of the Commission", and also included "the findings of fact on which" the Commission subsequently entered its order and award of damages; and on the 8th day of June, 1911, aforesaid, the Commission entered its order in the case, referring to its report, requiring the Lehigh Valley Railroad to "cease and desist from charging the rates then in effect" which were held to be unjust and unreasonable, and prescribing what were the reasonable and just rates to be observed for transportation of anthracite coal from the Wyoming Coal Region in Pennsylvania to Perth Amboy, New Jersey. On the 7th day of May, 1912, the Commission entered a further order (Record, p. 19), finding the reparation or damages to which complainant was entitled, both for the unjust discrimination in rates practiced by the defendant "during the period from November 1st, 1900 to August 1st, 1901", and also for the unreasonable rates charged complainant by the defendant from August 1st, 1901 to July 17th, 1907. Subsequently, on June 15th, 1912, the Commission entered a supplemental order (Record, p. 22), correcting a technical error in the name of the complainant, and extending the time within which the defendant was required to comply with the order of the Commission, to the first day of August, 1912.

*IV. Findings of the Commission in its report and supplemental report and orders aforesaid, were as follows:*

(a) AS TO UNJUST DISCRIMINATION DURING THE PERIOD FROM NOVEMBER 1st, 1900 TO AUGUST 1st, 1901.

1. In its report of June 8th, 1911, the Commission found that the complainant had sustained "the allegation of unjust discrimination" against him in rates during the period from November 1st, 1900 to August 1st, 1901, (Record, p. 36).

2. In its supplemental report, the Commission states that it found that the rates charged complainant from November 1st, 1900 to August 1st, 1901, "were unjustly discriminatory", and further finds that "from November 1st, 1900 to August 1st, 1901, complainant shipped" a certain number of tons of coal and paid thereon the sum of \$129,989.18, "at the rates found to have been unjustly discriminatory" (Record, pp. 16-17).

3. By the order of June 15th, 1912, upon the evidence of damage presented, reparation was awarded for the period November 1st, 1900, to August 1st, 1901, "for unjustly discriminatory rates charged", and "which rates so charged have been found by the Commission to have been unjustly discriminatory, as more fully and at large appears in and by said report of the Commission" (Record, p. 23).

(b) AS TO THE UNREASONABLE RATES CHARGED BY THE DEFENDANT FROM AUGUST 1st, 1901 TO JULY 17th, 1907.

1. In its report of June 8th, 1911, the Commission found that "defendant's rates for the transportation of coal \* \* \* \* are unreasonable so far as they exceed" the rates therein prescribed, and they found upon the evidence, that reparation should be awarded

"upon the basis of the rates herein found to be reasonable upon all shipments \* \* \* \* \* since August 1st, 1901," (Record, pp. 72-3).

2. In its supplemental report, the Commission states: "We further found that the rates in effect from August 1st, 1901 to July 17th, 1907 were unreasonable"; and further found that during that period complainant shipped certain coal "and paid charges thereon amounting to \$685,375.27, at the rates found to have been unreasonable", (Record, pp. 16-17).

3. In its order of June 15th, 1912, the Commission, upon the evidence, awards the complainant reparation for the period from August 1st, 1901, to July 17th, 1907, "for unreasonable rates charged for the transportation" of coal, "which rates so charged have been found by this Commission to have been unreasonable, as more fully and at large appears in and by said report of the Commission."

*V. Finding of the Commission as to the "violation of the provisions" of the Act to regulate Commerce, that the plaintiff was "injured thereby", and the "amount of damages sustained".*

(a) The supplemental report (Record, pp. 16-17) finds upon the evidence, that "from November 1st, 1900, to August 1st, 1901, complainant shipped from the Wyoming Coal Region of Pennsylvania to Perth Amboy, New Jersey," a certain specified number of tons of coal, "and paid charges thereon amounting to \$129,989.18, at the rates found to have been unjustly discriminatory; that the complainant *has been damaged* to the extent \* \* \* \* \* of \$11,009.33, with interest thereon from August 1st, 1901".

(b) The supplemental report then finds (Record,



pp. 16-17) the number of tons of coal shipped by complainant between August 1st, 1901 and July 17th, 1907, and that complainant "*paid charges thereon* amounting to \$685,375.27, at the rates found to have been unreasonable; *that complainant has been damaged* to the extent of the difference between the amount which he did pay and \$626,945.62, the amount which he would have paid at the rates found reasonable", etc., amounting to "\$58,326.45", with interest amounting to \$27,750.64 to September 1st, 1911, "together with interest on said sum of \$58,236.45 from September 1st, 1911." The order of the Commission of June 15th, 1912, (Record, p. 22) as required by Section 16 of the Act, then authorizes and directs the defendant to pay to complainant the amount he "has been damaged, as found by the Commission in its supplemental report setting forth the amount in dollars and cents."

Thus the Commission found by the supplemental report and order aforesaid, both "the fact" that complainant was damaged and the "amount of damage" which was sustained by him; the Commission found a "violation of the provisions" of the Act by the defendant; that complainant was "injured thereby"; "the full amount of damages sustained", and that the damages were sustained "in consequence" of defendant's violation of the Act; and this finding fully met the requirement of Section 14 of the Act, that the report of the Commission shall "*include* the findings of fact on which the award is made"; and upon these facts so found, Section 8 declares the carrier "liable", and Section 16 requires that "the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named."

VI. The Railroad Company having declined to

pay the amounts which it was thus directed to pay, thereafter on the third of September, 1912, petitioner filed his petition against the Company in the District Court of the United States for the Eastern District of Pennsylvania, "for the enforcement of an order" of the Commission "for the payment of money" (Section 16), and praying for judgment for the amount awarded to him under the order of the Commission aforesaid. On October 5th, 1912, the Company filed its plea to the petition, and on November 11th and 12th, the case was tried in the District Court. On the trial the petitioner offered (Record, p. 92):

First. The report of the Commission and the orders thereto attached, dated June 8th, 1911 (Exhibit C, Record, pp. 24 to 74, inclusive).

Second. The supplemental report (Record, pp. 107, 115, 116) of the Commission, with the order thereto attached, dated May 7th, 1912 (Record, pp. 15 to 20, both inclusive, Exhibit A).

Third. The order (Record, p. 116) of the Commission, dated June 15th, 1912, amending the order of May 7th, 1912, (Supplemental Order, Record, p. 22, Exhibit B).

It was further admitted by the defendant (Record, p. 116) that the reports and orders above set forth were duly served upon it.

The petitioner testified as a witness in his own behalf, and thereupon the petitioner's case was closed.

No evidence was offered by the defendants, except that, upon the plea of the Statute of Limitations, certain itemized statements were filed showing the dates of the shipment of the coal (being the same statements which were in evidence before the Commission and

upon which its reparation orders were based)—(Record, p. 143).

At the close of the case, the Court requested that Exhibits 1, 2, and 3 (being Exhibits A, B, and C above referred to) "be read to the jury" (Record, p. 138); and, thereupon, counsel for the plaintiff "Mr. Glasgow read to the jury what he stated to be material portions of said Exhibits." To the reading of the portions of the Exhibits, as requested by the Court, there was no objection by the defendant (although the defendant had objected to the Exhibits aforesaid, as a whole).

After the charge of the Court (Record, p. 193), the case was submitted to the jury, which "rendered a verdict in favor of the plaintiff for \$109,280.17."

Thereupon, the Railroad Company moved for a new trial and filed its reasons therefor; and on December 9th, 1912, an order was entered (Record, p. 212), denying the motion, and, upon evidence presented, fixing the attorney fees for services for complainant before the Commission and in the action. (Record, p. ). Thereupon, the Railroad Company filed its bill of exceptions, and a writ of error was allowed by the Circuit Court of Appeals to review the judgment of the District Court aforesaid.

The case was argued in the Circuit Court of Appeals in April, 1913; and, in the following August, an opinion was handed down, reversing the judgment of the District Court and directing a new trial, on the ground that the findings of the Commission were not in the form required by the Act and further that the findings and order of the Commission and the facts "therein stated" could not, under the Act, in any case, be sufficient evidence of the *plaintiff's case* and of the defendant's liability in damages.

On the 25th of September, 1913, petitioner filed his

petition for a rehearing and reargument in the Circuit Court of Appeals, *which petition was granted*. The case was reargued in December; and an opinion was handed down in February, 1914, reaffirming the previous decision.

VII. In its first opinion in this case (page 5), which is reaffirmed by the second opinion, the learned Circuit Court of Appeals states:

"By this report the Interstate Commerce Commission held that the charges by the defendant to the plaintiff between November 1st, 1900 and August 1st, 1901 were discriminatory and therefore unlawful, and also that the charges of the defendant company between August 1st, 1901 and July 1st, 1907 were unreasonable."

There can, therefore, be no dispute that the Commission did actually find that the rates charged petitioner from November 1st, 1900 to August 1st, 1901 were discriminatory and unlawful, and that the rates charged petitioner between August 1, 1901 and July 1st, 1907 were unreasonable and therefore unlawful. Nor can it be suggested that the Court experienced any difficulty in ascertaining that the Commission so found, regardless of the forms of the reports.

In the first opinion of the learned Circuit Court of Appeals (at pages 16-17), three propositions are stated, as requiring the reversal of the judgment of the District Court. These propositions were modified in the second opinion of the Court; but the conclusion reached was equally erroneous. The propositions as modified (see second opinion, page 16), are as follows:

"(1) That the finding of the Commission as to the reasonableness or otherwise of the rate charged by the carrier in interstate commerce, is charged by the carrier, is an administrative func-

tion properly and constitutionally delegated by the legislative power to the Commission, and is, if lawfully made, conclusive. If such finding of the Commission is, that a given rate charged by a carrier is unreasonable, it is as if the unreasonableness of such rate were fixed by the statute. The lawfulness of such finding is subject to judicial inquiry only in the respects above referred to.

(2) The finding by the Commission, that a given rate is unreasonable, while pertinent to the issue, in that it establishes a violation of the Act, is not decisive of the question of liability for damages, under Section 8, in such case as the present, either *prima facie* or otherwise.

(3) The pertinency and evidential weight and value of the facts as to which the findings and order are *prima facie* evidence, are for the determination of the court and jury, as in other civil causes. They may or may not make out a *prima facie* case for the plaintiff."

And the erroneous view of the Circuit Court of Appeals is shown in its first opinion, as corrected, page 26, as follows:

"On the contrary, as will be seen in the above extracts from the charge, the Court gave the jury to understand that the report and findings of the Commission as to discrimination and unreasonableness and the award of damages made thereon, were *prima facie* evidence of the plaintiff's case and of the liability of the defendant and conclusive upon the defendant unless he could rebut the same. In this we think the court was clearly in error."

From the above views of the Court, it is evident that its reversal of the judgment was based upon the erroneous view that the finding of the Commission that the defendant was guilty of a "violation of the provisions" of the Act, in that it practiced unjust discrimina-

tion against the petitioner and charged and collected from him unreasonable rates, and that the petitioner was "injured thereby", and the finding of "the full amount of damages sustained", and that such damages were sustained "in consequence" of defendant's violation of the Act, were insufficient evidence of the plaintiff's case and of the liability of the defendant, and even in the absence of any rebutting testimony by the defendant, that the petitioner was not entitled to judgment, even though the jury on this evidence found for the plaintiff.

This view of the Court is in conflict with the opinion of this Court in the case of *Mitchell Coal Co. vs. Pennsylvania R. R. Co.*, 230 U. S. 247, at page 258, where the Court, through Mr. Justice Lamar, speaking of reparation orders of the Commission, says:

"Such orders, so far as they are administrative, are conclusive, whether they relate to past or present rates, and can be given general and uniform operation, since all shippers who have been or may be affected by the rate can take advantage of the ruling and avail themselves of the reparation order. They are quasi-judicial, and only *prima facie* correct in so far as they determine the *fact and amount of damage*—as to which, since it involves the payment of money and taking of property, the carrier is by Section 16 of the Act given its day in court and the right to a judicial hearing. (March 2, 1889, 25 Stat. 855, 859, c. 382)" (*Italics ours*).

If the report and order of the Commission furnishes *prima facie* evidence of "the fact and amount of damage", it is obvious error to reverse a judgment upon the verdict of a jury for the plaintiff in accordance with the finding of the Commission, *where no evidence was introduced by the defendant rebutting the same*.

Under its second proposition above, taken in connection with the first, the Court states that a finding by the Commission that a rate is unreasonable, is conclusive that there was "a violation of the Act", yet that such finding "is not decisive of the question of liability for damages, under Section 8 in such case as the present, *either prima facie or otherwise*" (Italics ours). Section 8 provides that when it is shown that the carrier has been guilty of "any such violation of the provisions of this act", it "*shall be liable*". The violation of the Act creates under the law a liability for at least nominal damages; and, in order to justify substantial recovery the Commission must find, on evidence submitted, "the full amount of damages" suffered by complainant "in consequence of any such violation" of the Act.

Under its third proposition, the Court holds that plaintiff "may or may not" make out a *prima facie* case by offering the reports and orders of the Commission finding that the carrier had violated the provisions of the Act; that complainant had been "injured thereby", and the amount "of damages sustained" by complainant "in consequence of" the violation of the provisions of the Act. It would seem obvious under Section 16, that such proof, unrebutted, would entitle the plaintiff to recover.

VIII. The learned Circuit Court of Appeals apparently misapprehended the views of this Court in the case of *Pennsylvania Railroad Co. vs. International Coal Mining Co.*, 230 U. S. 184, and, in its first opinion (page 27), which view was reaffirmed in its second opinion, states:

"It hardly needs to be pointed out that the *ratio decidendi* of the Supreme Court" (in the *International Coal Company* case) "does not differ from that applicable to the present case."



This is a clear misconception. That was a common law action for damages, *without previous complaint to the Commission*, in which the burden of proof was upon the plaintiff; and the Court held, that while the plaintiff had shown the wrong committed by the defendant, it had failed to show that it was "injured thereby", and, therefore, that the proof was insufficient to meet the provisions of Section 8 of the Act; and the Court reversed the case, sending it back for a new trial. There was no finding and order of the Commission in that case, *as there is in the present case*; and the proof which was lacking in that case *was supplied in this case*, by the reports and orders of the Commission.

The International Coal Company case was reversed, because (230 U. S. 204):

"It is elementary that in a suit at law, both *the fact and the amount of damage* must be proved;"

and the proof was lacking.

In the case of *Mitchell Coal Company vs. Pennsylvania R. R. Co.*, 230 U. S., at page 258, this Court said that the orders of the Commission are to be taken by the Courts as *prima facie correct*, in so far as they determine "*the fact and amount of damage*".

In the present case, the complainant, *before the Commission*, gave evidence of the damage to his business by the unlawful discrimination from November 1st, 1900, to August 1st, 1901, and also showed that the prices of coal at tidewater were fixed by a circular of the Lehigh Valley Coal Company, the entire capital stock of which was owned by the Lehigh Valley Railroad Company; and that petitioner was in direct competition at tidewater in the sale of coal with the said Coal Company,

which controlled about 95% of the shipments over said Railroad to tidewater from the Wyoming Region; and that petitioner could not obtain a better price for his coal than that fixed by the Coal Company; and that having sold his coal at the price fixed by that Company, he was required by the Railroad Company to pay a greater amount in freight rates than his competitor. Evidence was also presented showing the unreasonableness of the rates charged to petitioner from August 1st, 1901, to July 1st, 1907, *and his damage*; and upon the evidence before it, the Commission found both "*the fact and amount of damage*". When, therefore, Section 16 of the Act provides "that on the trial of such suit the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated", it must necessarily follow that the shipper may rely on the findings of the Commission, and that it is not necessary, in the District Court, to present *all over again* the evidence showing *the fact and amount of damage*, especially when no evidence is offered by the defendant in rebuttal of the findings of the Commission, and when the evidence before the Commission is not put in evidence.

IX. At page 28 of its first opinion (reaffirmed in the second opinion), the learned Circuit Court of Appeals held:

"Nor more, in this case can the difference between what is found by the Commission to be the unreasonable tariff rate and that fixed as a reasonable one, be made the measure of the damage that the plaintiff has suffered."

This conclusion is in direct conflict with decisions of this Court and with decisions of the Circuit Court of Appeals in the Seventh and Ninth Circuits, as appears by the brief submitted herewith.

X. In the report of the Committee of the Senate on Interstate Commerce, of January 18, 1886, just prior to the passage of the Interstate Commerce Act, there appears a statement by the Committee of the purposes of the Act to Regulate Commerce. At page 214, the Committee says:

"Nor is it proposed to compel any citizen to rely solely upon the Commission recommended by this Committee, or to debar him from seeking redress from grievances from the judicial tribunals of the United States if he shall prefer to have recourse to them. On the contrary, it is expressly provided that he shall be free to pursue his remedy at common law or *under the statute herein recommended*, at his own discretion. It is not proposed to in any manner restrict the choice of remedies now available, but it is proposed to provide *additional means of obtaining redress with much less difficulty* and expense, and to render those already existing very much more effective.

"This can best be accomplished, it is believed, *by making the reports and recommendations of the Commission prima facie evidence as to the facts found in all cases which it investigates*. This would do more towards placing the shipper upon an equality with the carrier in a legal controversy than anything else that has been suggested, and would to a considerable extent, obviate the almost insurmountable difficulties now encountered by the shipper.

"With such a change in the rules of evidence, a favorable report by the Commission *would substantially establish the case of the complainant, should judicial proceedings become necessary, as it would lift from his shoulders the burden of proof and transfer it to the carrier.*" (Italics ours).

The conclusion of the learned Circuit Court of Appeals destroys all of benefit there is in the Act to shippers, so far as the Act justified the hope of a speedy

and inexpensive recovery for unlawful action on the part of the carrier.

XI. In its first opinion (reaffirmed in the second opinion), the learned Circuit Court of Appeals, in referring to the District Court admitting in evidence the reports and orders of the Commission, at page 20 says:

"As to these documents thus admitted in evidence, it is apparent that the requirement of Section 14, that, 'in case damages are awarded, such report shall include the findings of fact on which the award is made', has not been complied with by any express findings of fact in the supplemental report of May 7th, 1912, in which the award of damages against the defendant is made; that such findings of fact, if any, must be looked for in the voluminous pages of the original report filed June 8th, 1911, to which reference is made in the supplemental report; and that in said original report there are no findings of fact as such, and they must be gathered, if gathered at all, from a mass of recited evidence, statements, opinions and conclusions of the Commission, all of which are irrelevant to an award of actual pecuniary damages."

And, therefore, the Court's conclusion is, that the reports and orders of the Commission should not have been received in evidence in the District Court.

It would seem that the learned Court was clearly in error in concluding that these reports should not have been admitted in evidence in the District Court, when by its own opinion it appears that the reports found facts which it was necessary that the Commission should find before the petitioner could proceed in the courts. (See this petition, paragraph VII). Section 14 requires that, "in case damages are awarded, such report shall include the findings of

fact on which the award is made"; and the Commission in this case sets forth clearly its finding the fact of unjust discrimination against the plaintiff from November 1st, 1900 to August 1st, 1901, and that the plaintiff had been charged and had paid as shipper unreasonable rates between August 1st, 1901 and July 1st, 1907; the amount of tonnage shipped upon which plaintiff paid unlawful charges; that plaintiff was damaged and the amount per ton, and the total amount which it was necessary to award to the plaintiff as reparation for the unlawful violation of the Act for which the carrier is made liable by Section 8. There was, thus, every finding of fact required by the Act, upon which "the award is made".

Section 8 specifies the facts which the Commission must find before the carrier can be held liable to "an award". That Section provides, that, if a carrier has violated the "provisions of this Act" by "unjust discrimination" forbidden by Sections 2 and 3 of the Act, or by charging "unreasonable rates" forbidden by Section 1, such carrier "shall be liable". The liability is to the person "injured thereby", and "for the full amount of damages sustained in consequence of any such violation of the provisions of this Act." When the Commission found the fact in this case of "unjust discrimination" and "unreasonable rates", the fact of who was "injured thereby" and "the full amount of damages sustained", then Section 16 required the Commission, being satisfied by its investigation that "any party complainant is entitled to an award of damages" and "for a violation" of the Act, "to make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named."

Section 14 requires the Commission to make a report, "and in case damages are awarded, such report

shall *include* the findings of fact on which the award was made". It is obvious that "the findings of fact" referred to in Section 14 are the same facts which are made the basis of liability under Section 8, and which are made the basis of the "award of damages" by Section 16. In this case, the facts necessary to the liability of the defendant to the plaintiff under Section 8 and to the "award of damages" under Section 16, were beyond all question found by the Commission in its reports and orders; and they were the "findings of fact" referred to in Section 14 "on which the award is made."

The essential facts to sustain petitioner's case having been found by the Commission in its reports and orders, it was an erroneous construction of the Act by the Circuit Court of Appeals to hold that such reports and orders are not admissible in evidence in the District Court because the reports do not contain "an express findings of fact" distinct from the Commission's view of the case and the evidence before it. If the reports and orders of the Commission contain the essential facts justifying the petitioner's recovery, how could the defendant, who offered no evidence in rebuttal, be prejudiced by the Commission's review of the evidence before it and the history of the case?

XII. The Circuit Court of Appeals was also in error in its view as to the Statute of Limitations contained in Section 16 of the Act to Regulate Commerce.

The petitioner's claim, or practically all of it, accrued prior to the passage of the amendatory Act of 1906 (34 Stat. L. 590), and his petition was filed with the Interstate Commerce Commission on July 17th, 1907, and "within one year" after the effective date of the Act of 1906, which contained the first express limitation as to filing claims before the Commission.

At the time the petitioner's claim was filed, it was not barred by any statute of limitations in the State of Pennsylvania, where the claim arose. Section 16 of the Act of 1906 provides:

*"All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the Circuit Court or State Court within one year from the date of the order and not after; provided that claims accrued prior to the passage of this Act may be presented within one year."*

Under this provision of Section 16, the learned Circuit Court of Appeals holds in its first opinion, page 31 (reaffirmed in its second opinion), "that the Commission in this case had no jurisdiction to entertain a claim of the shipper accruing prior to July 17th, 1905", being a date two years prior to filing the complaint.

The learned Court holds that, notwithstanding the petitioner's claim "accrued prior to the passage of" the Act of 1906, and although his claim was "presented within one year" thereafter to the Commission, the Commission had no jurisdiction "to entertain a claim of the shipper accruing prior to July 17th, 1905." This conclusion of the Court is in direct conflict with the plain provisions of the Statute; and any such construction of the foregoing provisions of Section 16, taking from the petitioner the right to present his claims already accrued and not giving effect to the proviso permitting the claims to be filed "within one year", would render the whole provision as to limitation, in Section 16, unconstitutional.

The above conclusion of the learned Court would bar about 76% of the entire damages awarded to peti-

tioner and is in conflict with many decisions of the Interstate Commerce Commission:

See Interstate Commerce Commission "Conference Ruling, Bulletin No. 5, Rule 10, as follows:

"Claims filed with the Commission since August 28th, 1907 must have accrued within two years prior to the date when they are filed; otherwise they are barred by the Statute. Claims filed on or before August 28th, 1907 are not affected by the two years limitation."

See also 14 I. C. Rep. 199, 206; 23 I. C. C. Rep. 483, 487.

This view of the Court is also in conflict with the opinion of the Circuit Court of Appeals for the Sixth Circuit, in *Louisville & Nashville R. R. Co. vs. Dickerson*, 191 Fed. 705, reaffirmed in *A. J. Phillips Co. vs. Grand Trunk Ry. Co.*, 195 Fed. 12 at p. 19; and it is in conflict with the decision of this Court in the case of *Great Northern Ry. Co. vs. United States*, 208 U. S. 452, 468.

The learned Circuit Court of Appeals seems to have entirely overlooked the proviso in Section 16.

XIII. Your petitioner is advised and believes that in the proceedings instituted by him against the Lehigh Valley Railroad Company, the Interstate Commerce Commission followed the practice that it has always heretofore observed in such proceedings, in its manner of making its findings and awards, as well as in the construction of the Statute of Limitations enacted by the amendment of 1906; and if the construction which has now been placed upon the Act by the Circuit Court of Appeals is correct, it will necessitate a complete reversal of the procedure of the Commission, and place a heavier burden upon the shipper than existed at common law.



XIV. In December, 1913, about the same time that this case was reargued before the Circuit Court of Appeals, the similar case of Pennsylvania Railroad Co. vs. W. F. Jacoby & Co., pending in the same Court, was argued. That case also involved the question of the value, as evidence in the Courts, of the findings and orders of the Interstate Commerce Commission in a case in which it awarded reparation. In that case, the Circuit Court of Appeals has certified to this Court three questions of law, "in order that it may be guided to a proper decision of the controversy"; and of the three questions certified, two are as follows:

"(2) Were the finding and the order quoted above, or was either of them—*prima facie* evidence of themselves, or of itself, that the defendant had become liable to Jacoby & Company in some amount by the discriminating practices referred to?"

"(3) If the finding and the order—either, or both, of them—were *prima facie* evidence that the defendant had become liable in some amount, were they—or was either of them—*prima facie* evidence also of the amount of such damage?"

The certification of these questions presents to this Court two of the identical questions passed upon in the present case; and the fact that the Circuit Court of Appeals in this case granted a rehearing, and now, after a reaffirmation of its former opinion, certifies, in another case, two of the questions passed on, evidences the fact that the Court is in doubt upon the questions involved in the present case; and this alone would warrant petitioner in praying that the present case be brought to this Court by certiorari, in order that the very important questions presented may be settled by this Court, along with the Jacoby case, aforesaid; for unless this course is adopted, petitioner will



be required to go back to the District Court and try his case upon an erroneous view of the law, which can only be corrected by writ of error, appeal and a third trial in the District Court.

XV. There was a second complaint made to the Interstate Commerce Commission by petitioner, in his own name; and exactly the same course was followed as is above set forth as to the first case, the only difference being that the partnership of Meeker & Company having been dissolved by the death of one of the partners, it was necessary that the claim should be filed by petitioner individually; and the claim before the Commission was exactly the same, except that the period covered was from July 17, 1907 to April 13, 1910. The two cases were treated by the Commission as being heard at the same time, without objection. The suits to enforce the orders of the Commission were heard at the same time by the District Court, and the Circuit Court of Appeals reversed the judgment of the plaintiff in the second case just as it did in the first; and for the reasons set forth above, a certiorari should bring up both of the cases above mentioned, to the end that speedy justice may be done.

XVI. Petitioner further shows that the questions involved in the issues presented in this cause are of great public importance and affect many cases now pending before the Interstate Commerce Commission and in the Courts of the United States, and that the proper determination of the issues thereof only requires a correct interpretation and construction of the Act to Regulate Commerce; and the confusion produced by the decision of the learned Circuit Court of Appeals in this case will lead to almost interminable litigation and seriously affect the Interstate Commerce Commis-

sion in carrying out the duties put upon it by the Act to Regulate Commerce. In this case, petitioner has been in litigation for nearly seven years, and under the erroneous conclusion of the Circuit Court of Appeals herein, will be required to go back to the District Court and have that Court commit error under the opinion of the learned Circuit Court of Appeals, and then come up to the Circuit Court of Appeals again, have that error affirmed, and then, by writ of error, proceed to this Court, and if this learned Court should then reverse the Circuit Court of Appeals, petitioner will be required to go back to the District Court and retry his case for the third time.

Wherefore, because of the gravity and importance of the questions involved, and in the interest of uniformity of decision, so that a definite and certain construction of the Act to Regulate Commerce may be secured, and so that the *rights of shippers, the obligations of carriers and the duties of the Interstate Commerce Commission* may be correctly established and declared under the Act to Regulate Commerce, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the Judges of the United States Circuit Court of Appeals for the Third Circuit, commanding them and each of them to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals in each of the cases lately depending therein, entitled *Lehigh Valley Railroad Company, plaintiff-in-error, vs. Henry E. Meeker, Surviving Partner of the firm of Henry E. Meeker and Caroline H. Meeker, doing business under the trade name of Meeker & Company, defendant-in-error*, March Term, 1913, No. 1721, and *Lehigh*

Valley Railroad Company, Plaintiff-in-error vs. Henry E. Meeker, Defendant-in-Error, March Term, 1913, No. 1720, to the end that the judgments of said Circuit Court of Appeals in said causes may be reviewed as provided by law, and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem proper and in conformity with law.

And your petitioner will ever pray, etc.

*(Sgd). Henry E. Meeker*

*Petitioner.*

STATE OF NEW YORK, }  
 COUNTY OF NEW YORK. } ss.

HENRY E. MEEKER, being first duly sworn, says that he is the petitioner; that he has read over the foregoing and annexed petition and knows well the contents thereof, and that he has also carefully read and studied a duly certified copy of the transcript of record under the seal of the United States Circuit Court of Appeals for the Third Circuit in the case of Lehigh Valley Railroad Company, plaintiff-in-error, vs. Henry E. Meeker, Surviving Partner of the firm of Henry E. Meeker and Caroline H. Meeker, doing business under the trade name of Meeker & Company, defendant-in-error, March Term, 1913, No. 1721, and Lehigh Valley Railroad Company, plaintiff-in-error vs. Henry E. Meeker, defendant-in-error, March Term, 1913, No. 1720; that the matters of fact stated in said petition are fully supported in and by said transcripts of record, and are true to the best of his knowledge, information and belief.

HENRY E. MEEKER.

Sworn and subscribed to before  
 me this 13<sup>th</sup> day of March,  
 1914.

*Morris Pollinger* (Seal)  
 Notary Public.  
 # 102.

In our opinion, the foregoing and annexed petition  
 for certiorari is well founded in law.

WILLIAM A. GLASGOW, JR.,  
 JOHN A. GARVER,  
*Counsel for Petitioner.*

## NOTICE.

To John G. Johnson, Esq.,

Attorney for Lehigh Valley Railroad Company,

Sir:

You will please take notice that on the 30<sup>th</sup> day of March, 1914, at 12 o'clock, noon, or as soon thereafter as counsel may be heard, the foregoing petition and accompanying brief will be submitted to the Supreme Court of the United States, at its usual place for holding its sessions in the Capitol, at Washington, D. C., for its consideration and action, at which time and place you will please take such action in the premises as you may be advised.

WM. A. GLASGOW, JR.,

JOHN A. GARVER,

*Counsel for Petitioner.*

## ADMISSION OF SERVICE.

Service of a copy of the foregoing petition and brief is acknowledged this 14<sup>th</sup> day of March, 1914.

*(s.g.d.) John G. Johnson*  
*att'y. for L.V.R.Co.*

1880-1881.

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# SUPREME COURT OF THE UNITED STATES

Office Supreme Court, U.

FILED

APR 6 1914

JAMES D. MAHER  
CLERK

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In the Matter of the  
Petition of **HENRY E. MEERER.**

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On Application for Writ of Certiorari to the  
United States Circuit Court for the Third  
Circuit.

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## BRIEF FOR PETITIONER.

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WM. A. GLASGOW, JR.,  
JOHN A. GARVER,  
*Counsel for Petitioner.*

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IN THE  
Supreme Court of the United States.

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October Term, 1913.

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In the matter of the Petition of  
HENRY E. MEEKER.

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**BRIEF FOR PETITIONER.**

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On application for Writs of Certiorari to the United  
States Circuit Court of Appeals for the  
Third Circuit.

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**STATEMENT.**

Application by Henry E. Meeker, individually and as surviving partner of the firm of Meeker & Co., for writs of certiorari to the United States Circuit Court of Appeals for the Third Circuit, to review two judgments of reversal directed by that Court, the judgments reversed being for \$109,280.17 and \$13,161.78, respectively, in favor of the petitioner.

Meeker & Co. brought an action against the Lehigh Valley Railroad Company, under Section 16 of the Interstate Commerce Act, to recover damages awarded to them by the Interstate Commerce Commission, by reason of violations of the Act in unjustly discriminating against them and in charging unreason-

able rates for transportation of coal over its line to tidewater. The alleged discrimination covered the period from November 1, 1900, to August 1, 1901; and the excessive rates covered the subsequent period from August 1, 1901, to July 17, 1907.

A second action was brought to recover the additional damages awarded on account of unreasonable rates, for the period subsequent to July 17, 1907; but damages were awarded only for the two years prior to April 13, 1910, when the second complaint was made to the Commission.

After a very extensive hearing, covering a period of about four years, the Commission reported in favor of the complainant in both cases, and entered orders awarding the damages to be paid by way of reparation.

Subsequently, the two actions were commenced in the District Court, under Section 16 of the Act, to recover the damages awarded. Upon issue joined, the actions were brought to trial. The plaintiff put in evidence the reports and orders of the Commission and supplemented these by some evidence on the part of the petitioner. The defendant offered no evidence whatever on the question of the rates or damages, merely submitting a computation used before the Commission, as bearing upon the application of the Statute of Limitations. A verdict was rendered in each case in favor of the plaintiff. Thereafter, upon evidence presented in open Court, the trial Judge fixed the attorney's fee for the services before the Commission and in the actions, at \$10,000 and \$2,500, respectively, in each case. Judgments were thereupon entered in favor of the plaintiff for the amounts awarded by the Commission above stated, and the court ordered that the attorney's fees above stated be taxed as a part of the costs in each case, respectively. These judg-

ments were reviewed by the Circuit Court of Appeals, by writ of error. They were reversed by that Court and new trials directed, on the ground that the findings of the Commission were not in the form required by the Act to entitle their use as evidence upon the trial of the actions and that the findings and orders of the Commission are not in any case sufficient to establish a liability on the part of the carrier, even though no evidence may be offered by the carrier. The Appellate Court also held that the Commission had adopted an erroneous theory in awarding the damages.

All these questions involve the construction of the Interstate Commerce Act.

The damages based upon the discrimination were only \$11,009.33 (exclusive of interest), and constituted less than 15% of the entire damages awarded.

On application, the Circuit Court of Appeals granted a reargument; but, after such reargument, it adhered to its previous decision.

At the time of the reargument, there was pending in the Circuit Court of Appeals, an action brought by Jacoby & Co. against the Pennsylvania Railroad Company, in which questions of law were involved, depending upon the construction of the Interstate Commerce Act, similar to those involved in the Meeker cases. Pending its decision of the Jacoby case, the Circuit Court of Appeals has certified to this Court for its instructions, the very questions which it has decided in the Meeker cases.

The practice of the Commission in making its reports in the Meeker cases and in awarding the damages, *has been that which has uniformly been observed by the Commission since its establishment.* The effect of the decision of the Court below is, therefore, to reverse the settled practice of the Commission, to disregard the construction which has for many years

been placed by the Commission upon the Act and to throw a burden upon the shipper in attempting to redress his grievances, **greater than that which existed at common law.**

On the question of the Statute of Limitations, the Circuit Court of Appeals held that, under the amendatory Act of 1906 (34 Stst. L., 590), permitting complaints to be made on existing claims within one year and barring all other claims at the end of two years, Meeker & Co. could not recover upon any claims arising prior to July 17, 1905 (two years before the complaint was made to the Commission). This decision was also contrary to the construction uniformly placed upon the amendatory Act by the Commission, and the construction of the Commission has heretofore been referred to by this Court with approval. The effect of the decision of the Circuit Court of Appeals on this point is to bar at least 75% of the entire amount of the claims of Meeker & Co., or \$97,518.57 out of a total of \$128,004.26.

If a new trial should be had under the existing decision of the Circuit Court of Appeals, evidence of discriminatory or unlawful rates and consequential damages prior to July 17, 1905, would have to be excluded. If this Court should subsequently hold that the Circuit Court of Appeals was wrong in its construction of the amendment of 1906, a third trial would thus be inevitable. On the other hand, if this Court should, upon review of the whole case by a writ of certiorari, find that the Circuit Court of Appeals committed error in its construction of the Act to Regulate Commerce and in reversing the District Court, it could reverse the judgments and direct final judgment in favor of the petitioner, as it did in the recent case of *Delk v. St. Louis & San Francisco R. Co.* (220 U. S., 580).

**POINTS.**

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**FIRST.****THE COURT HAS UNDOUBTED POWER TO GRANT THE WRIT.**

I. That this Court has the power to grant a writ of certiorari in a case such as this, has been expressly decided.

Delk v. St. L. & San. Fr. R. Co., 220 U. S., 580.

That case is on all fours with the present case. It was brought under the Safety Appliance Act, to recover damages sustained by the plaintiff by reason of the failure of the defendant to comply with the requirements of the Act, the plaintiff having made the following averment in his declaration or complaint:

“The defendant negligently, carelessly and recklessly, in open defiance of Chapter 193 of the Acts of Congress of 1893, failed to provide the plaintiff with a safety appliance with which to couple said cars.”

The plaintiff's statement of his cause of action “regardless of questions that may have been brought into the suit by the answers or in the course of the subsequent proceedings, must determine the grounds of jurisdiction of the court”: *Shulthis vs. McDougal*, 225 U. S. 561, at page 569.

Not only did the Delk case arise under a law of the United States, but the decision turned upon the construction of that law, the point being whether the statute imposed an absolute duty on the Railroad Company to provide a particular kind of couplers. The action was commenced in the State court. There was a diver-



sity of citizenship (as in the case at bar; Rec. pp.5-6), as well as the construction of a Federal statute. The action could have been removed to the Federal court on either or both grounds, although the removal was asked for only on the ground of diversity of citizenship. A judgment was rendered in the Circuit Court in favor of the plaintiff, which, on appeal, was reversed by the Circuit Court of Appeals, *and a new trial ordered*. This was done, on the ground that the Safety Appliance Act did not impose an absolute duty on the carrier to provide a particular kind of automatic couplers, but that the Company was required merely to exercise due care in complying with the general provisions of the Act (p. 586).

On these facts, this Court granted a writ of certiorari, and subsequently reversed the judgment of the Circuit Court of Appeals and affirmed the judgment of the Circuit Court. Obviously, the writ was granted because the construction of a Federal law was involved; otherwise, the case would have had no importance, but would have been merely one of innumerable negligence cases involving no novel principle. This was expressly recognized by this Court, which said (p. 581):

“The declaration contains several counts, but the basis of the plaintiff’s claim is the alleged failure of the railroad company to provide proper automatic couplers as required by the Act of Congress of March 2, 1893, known as the Original Safety Appliance Act.”

Every circumstance in the Delk case is repeated in the present case, with the single exception that the action there was commenced in the State court and was removed to the Federal court, while here it was commenced in the Federal court. That, however, can

make no difference in principle; because, under Section 16 of the Interstate Commerce Act, this action might have been brought in the State court and the defendant could have removed it into the Federal court either on the ground of diversity of citizenship or on the ground that it arose under a law of the United States. Whether the action gets into the Federal court upon the initiative of the plaintiff or of the defendant can make no difference, as the power of this Court to grant a writ of certiorari depends upon the Federal statutes upon the subject as affecting actions pending in the Federal courts. The mere fact that the case had been removed into the Federal court on the ground of diversity of citizenship did not make it one in which the judgment of the Circuit Court of Appeals would be final, if a Federal question was involved, as, in such case, either party would have been entitled, as a matter of right, to a writ of error from this Court, under Section 241 of the Judicial Code.

II. The statutory provisions conferring power upon this Court to grant writs of certiorari are contained in Sections 240 and 262 of the Judicial Code, and are as follows:

“Sec. 240. In any case, civil or criminal, in which the judgment or decree of the Circuit Court of Appeals is made final by the provisions of this Title, it shall be competent for the Supreme Court to require, by certiorari or otherwise, upon the petition of any party thereto, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.”

“Sec. 262. The Supreme Court and the district courts shall have power to issue writs of

*scire facias*. The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdiction and agreeable to the usages and principles of law."

Section 240 is a re-enactment of Section 6 of the Act of March 3, 1891, which created the Circuit Courts of Appeal; and Section 262 is a re-enactment of Section 716 of the Revised Statutes (Sec. 6 of the Judiciary Act).

If it should be contended that this Court has no power, in the present case, under Section 240, to grant the writ for the purpose of reviewing the decision of the Circuit Court of Appeals, because the action arose under a law of the United States, and is, therefore, not one in which the decision of the Circuit Court of Appeals is made final, the same must be said of the application in the Delk case. The fact that diversity of citizenship was the sole ground on which removal to the Federal Court was asked, could not have prevented an appeal to this court from a final judgment of the Circuit Court of Appeals, since the action was in fact brought under the Safety Appliance Act. The petition for removal could not limit the grounds of jurisdiction stated in the plaintiff's declaration, so as to prevent a writ of error from this court.

*Shulthis vs. McDougal (supra).*

If the application in the Delk case was not granted under the power conferred by Section 240, it must have been granted under the power conferred by Section 262. The power of this Court to grant the writ under the latter Section is undoubted, as the case is certainly one within the appellate jurisdiction of the Court, inasmuch as either party would be entitled to sue out a

writ of error, owing to the fact that the construction of a Federal statute is involved.

Judicial Code, Sec. 241.

While this Court exercises the power to issue the writ sparingly, *it is reluctant to place any limitations upon such exercise.*

McClellan v. Carland, 217 U. S., 268, 279.

III. In discussing the power of the Court, under Section 716 of the Revised Statutes (Section 262 of the Judicial Code), Mr. Justice Gray, in *American Construction Co. v. Jacksonville Ry.* (148 U. S., 372), recognized the general power of the Court to issue a writ "in proper cases" (p. 380); and *In Re Tampa Suburban R. Co.* (168 U. S., 583), this Court said (p. 587) that Section 716 "undoubtedly authorized the issue of writs of certiorari in *all* proper cases."

What may constitute a proper case is left to the discretion of the Court. The power is a very broad one, as was recognized *In Re Chetwood* (165 U. S., 443), where it was said (p. 462):

"This writ has not been issued as freely by this Court as by the Court of Queen's Bench in England, and prior to the Act of March 3, 1891, had been *ordinarily* used as an auxiliary process merely: yet, whenever the circumstances imperatively demanded that form of interposition, the writ may be allowed, as at common law, to correct excess of jurisdiction and *in furtherance of justice.* Tidd Pr., 398; Bac. Ab., Certiorari."

This statement was cited with approval in *Whitney v. Dick* (202 U. S., 132, 140).

The above reference to Bacon's abridgement will be found at page 162, under the title, "Certiorari":

"A certiorari is an original writ issuing out

of chancery or the King's Bench, directed in the King's name to the judges or officers of inferior courts, commanding them to return the records of a cause depending before them, to the end that the party may have the *more sure and speedy justice* before him or such other justices as he shall assign to determine the case."

This means, as this Court said in the Tampa Suburban Railroad case (p. 588), that when the writ is sought as between private parties, the general rule is that "it will be granted or denied in the sound discretion of the Court on special cause or ground shown and will be refused *where there is a plain and equally adequate remedy by appeal or otherwise*".

IV. In the case at bar, the petitioner cannot obtain a writ of error from this Court to review the judgment of reversal; and he has no other adequate remedy. If he should go back to the District Court for a new trial, it would not only be possible for the Railroad Company to compel a retrial of all the issues that were once tried before the Commission, at an enormous expenditure of time and money (reflected in the record of 3000 pages, which includes innumerable tables giving summaries of elaborate and detailed research work by experts and professional accountants), but, under the construction placed upon the Act by the Circuit Court of Appeals, limiting the right to recover to two years prior to July 17, 1907, more than 76% of the damages allowed by the Commission would be barred by the Statute of Limitations. Therefore, even if successful in recovering some damages, Mr. Meeker would be obliged to take an appeal to the Circuit Court of Appeals for the purpose of ultimately obtaining the decision of this Court on the question of the Statute of Limitations. On such an appeal, the Circuit Court of

Appeals would necessarily adhere to the decision that it has already rendered and reiterated on the rehearing. If this Court should then conclude that the decision of the Circuit Court of Appeals was erroneous on the question of the Statute of Limitations, it would have to send the case back for a third trial; for all evidence as to the damages sustained during the period prior to the two year period would have been excluded on the second trial. Thus, a third trial would be inevitable. No individual shipper can afford to litigate such questions indefinitely; and it would be a denial of justice to compel the petitioner to pursue such a course when, if his construction of the statute is correct (as was determined by the Commission and by the District Court), the judgment of the Circuit Court of Appeals can be reversed and the judgment of the District Court affirmed upon the writ of certiorari, as was done in the Delk case; and "sure and speedy justice" could be rendered. It is thus obvious, that the granting of the writ in the present case is absolutely essential to the preservation by this Court of its appellate jurisdiction; for, otherwise, the obstacles to a review of the case by this Court ultimately would practically be insurmountable. As it said in *Whitney v. Dick* (202 U. S., 132, 140), "undoubtedly the power exists, and it may sometimes be proper for a court to put an end to the litigation by some short summary process". It is respectfully submitted that if it is ever proper to do that, the case at bar is peculiarly one in which the power of the Court should be exercised.

V. It is no objection to the granting of the writ that the judgment of the Circuit Court of Appeals was one of reversal. That was also the fact in the Delk case, as well as in a more recent case where the writ

was granted by this Court (*Flannelly v. Del. & Hud. Co.*, 225 U. S., 597); and the writ may be issued even before the appeal has been heard in the Circuit Court of Appeals.

The Three Friends, 166 U. S., 1, 5, 49.

Forsyth v. Hammond, 166 U. S., 506, 512.

## SECOND.

### REASONS WHY THE WRIT SHOULD ISSUE.

Even if there were no question of public interest in this case, the writ should issue in order to ensure summary and speedy justice and preserve the appellate jurisdiction of this Court. But there are questions of vital public interest, involving the construction of important provisions of the Interstate Commerce Act and affecting the interests of shippers and carriers throughout the entire country.

I. The decision of the Circuit Court of Appeals is at variance with the construction placed upon Section 16 and upon the amendatory Act of 1906 by the Circuit Courts of Appeals of other Circuits.

C. B. & Q. Ry. Co. v. Feintuch, 191 Fed. 482, 485-6 (Ninth Cir.);

L. & N. R. R. Co. v. Dickerson, 191 Fed., 705, 711-12 (Sixth Cir.);

Denver v. Rio Gr. R. Co. v. Baer Bros. Mercantile Co., 209 Fed., 577 (Eighth Cir.);

National Pole Co. v. Ch. & N. W. Ry. Co. (Seventh Cir.), not yet reported.

And it is at variance, on the question of the Statute of Limitations, with Conference Ruling Bulletin No. 5, Rule 10 of the Commission:



"Claims filed with the Commission since August 28th, 1907, must have accrued within two years prior to the date when they are filed, otherwise they are barred by the Statute. Claims filed on or before *August 28th*, 1907, are not affected by the two years limitation."

The reason for giving special power to this Court to review judgments of the Circuit Courts of Appeal, by writs of certiorari, even where the decisions of those courts were made final, was to ensure a uniform body of Federal law and practice. That alone, in the present case, would be sufficient ground for granting the writ.

Columbia Watch Co. v. Robbins 148, U. S., 267.

II. That the decision of the Circuit Court of Appeals in the present case was one about which that Court was and still is in serious doubt, is evident from the fact that, in the Jacoby case still pending before it, it has asked for the instructions of this Court upon the vital questions in the present case which it decided adversely to the petitioner (Petition, p. 21 ).

This, in itself, constitutes a deliberate expression of the Circuit Court of Appeals that the questions involved upon the present application are of exceptional gravity and importance.

Lau Ow Bew, 141 U. S., 583, 587.

III. The decision of the Circuit Court of Appeals is at variance with the uniform practice of the Interstate Commerce Commission, ever since its creation, in the method adopted by it in making its findings and orders (Petition, p. 16 ). In other words, the construction placed upon the law by the Court below is contrary to the settled construction of the official body

charged with the duty of enforcing it. The construction of such a body is always entitled to the greatest consideration.

Cohens v. Virginia, 6 Wheat., 264.

And when it has been long continued, the Courts will recognize it as conclusive.

U. S. v. Hill, 120 U. S., 169, 180;

Robertson v. Downing, 127 U. S., 607, 613;

U. S. v. Alabama, 142 U. S., 615, 621.

IV. The construction placed upon the Act in this case by the Circuit Court of Appeals nullifies the provisions of Section 16 of the Interstate Commerce Act, that the findings and order of the Commission shall be *prima facie* evidence in an action against a carrier to collect the damages sustained by the violation of the statute. No evidence was submitted on the trial of this case by the Railway Company, after the plaintiff had offered in evidence the findings and order of the Commission; and yet, the Circuit Court of Appeals has held that these findings and order did not make out a *prima facie* case on which the plaintiff was entitled to judgment.

V. The Interstate Commerce Act was passed to protect shippers, by bringing common carriers under the supervision and regulation of a Commission, which should have power to hear and determine complaints and award damages. As part of the scheme, it was expected that the grievances and wrongs of the shippers could be righted by an expert body summarily and without the formalities, technicalities and expense involved in an action at law. The Act was certainly not intended to throw additional obstacles and difficulties in the way of the shipper. But the decision of the

Circuit Court of Appeals in the present case leaves the shipper in worse plight than he was in under the common law. In the case of unreasonable rates, for instance (at least 85% of the petitioner's claims depends upon a finding that the rates were unreasonable), the fact and the extent of the excessive charge must be found and an award of damages made by the Commission before resort can be had to the Courts.

Mitchell Coal Co. v. Penn. R. R. Co., 230 U. S.,  
247.

But, under the decision of the Circuit Court of Appeals, in the case at bar, the findings and order are without any probative force; because, although made in such manner that the decision of the Commission is entirely clear, yet they are not technically in proper legal form, although the Act nowhere prescribes a particular form.

VI. The Circuit Court of Appeals held that the finding of damages by the Commission was not a finding of fact but a mere conclusion of law, and, therefore, not sufficient to justify a verdict by the jury, even though no evidence to the contrary was given by the defendant. The Court held that this finding of the Commission was a conclusion of law, because the Commission wrongly assumed that the difference between the unreasonable rate and the reasonable rate represented the damages sustained by the shipper.

1. It is respectfully submitted that the finding was one of fact and not of law; and the Court completely ignored the significant fact, that the evidence before the Commission, on which it made its finding, was not offered on the trial of the action. Consequently, the finding of damages may have been supported by other evidence, on which

the Commission relied. The mere fact that the amount represented the difference between the excessive charge and a reasonable charge does not preclude the possibility that there may have been other evidence bearing on the question, justifying such conclusion.

2. It would have been entirely proper, however, for the Commission to base a finding of the amount of damages upon the difference between the excessive charge and the charge which it considered to be reasonable.

National Pole Co. v. Ch. & N. W. Ry. Co. (Seventh Circuit), not yet reported;

Texas etc. Ry. v. The Abilene Cotton Oil Co.,  
204 U. S., 425, 436;

Southern Ry. Co. v. Tift, 206 U. S., 440.

Mitchell Coal Co. vs. P. R. R. 230 U. S. 247,  
264.

In the National Pole Co. case, the Court quoted with approval what this Court had said in the Mitchell case at page 264:

“Since the Commission is charged with the duty of determining whether the practice was so unreasonable as to be a violation of the law, the plaintiff must, as a condition of his right to succeed, produce an order from the Commission that the practice or the rate was thus unreasonable and therefore illegal and prohibited. \* \* \* The courts can then apply that law, and, measuring what has been charged by what the Commission says should have been charged, can award damages to the extent of the injuries occasioned by the payment of the allowance found to be unreasonable and unlawful.”

In the Abilene Cotton case, this Court said (p. 436):

“It is also beyond controversy that where a carrier accepted goods without payment of the cost of carriage or an agreement as to the price to be paid, and made an unreasonable exaction as a condition of the delivery of the goods, an action could be maintained to recover the excess over a reasonable charge.”

In *Southern Ry. Co. v. Tift*, the Railway Company filed advanced rates on lumber, and a suit was brought to enjoin the carrier from putting the rates into effect. The Court declined to grant the injunction, and the advanced rates became effective and were paid by complainant. The Court held the bill until the plaintiffs applied to the Interstate Commerce Commission to have the advanced rates declared unreasonable. An order was made by the Commission, declaring the old rates reasonable and the advanced rates unreasonable; and the Circuit Court then referred the case to a Master to ascertain “the sum total of the increase in rates paid by each of the complainants and other members of the Georgia Sawmill Association to either or all of the defendant companies since the rate went into effect, to the end of the litigation”. Commenting upon the practice, this Court, at the close of its opinion, said (206 U. S., 440):

“The objection that the reference is too broad is not of substance. What the court may award upon the coming in of the report of the Master, we cannot know. *Presumably, it will make the reparation adequate for the injury, and award only the difference on the old rate and to those who are parties to the cause.*”

3. While the Circuit Court of Appeals in the present case recognized that the rule just stated existed at common law, it held that this rule had been changed by the Interstate Commerce Act. In other words, it

disregarded the familiar principle that statutes in derogation of the common law are to be strictly construed and that no change in the common law will be presumed unless the intention to make the change is clearly expressed.

Shaw v. Railroad Co., 101 U. S., 557, 565.

The Court thus necessarily reached the astonishing conclusion, that the Act was intended to throw a heavier burden upon the shipper than existed at common law, in the matter of proving his damages. But this Court evidently entertains quite a different view, as is evident from many of its decisions; and, in the very recent case of Mitchell Coal Co. v. Penna. R. R. Co. (230 U. S., 247), it cited with approval (p. 260), two decisions of the Commission, in which damages amounting to the difference between the rates paid and the reasonable rates as fixed by the Commission were awarded, as a matter of course.

#### VII. The Statute of Limitations.

The Interstate Commerce Act was amended by the Act of June 29, 1906, so as to read as follows:

“All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrued, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the Circuit Court within one year from the date of the order, and not after: *Provided, that claims accrued prior to the passage of this Act may be presented within one year.*”

The first claim against the respondent was presented to the Commission on July 17, 1907, that is, within one year after the Act took effect, which was August 28, 1906.

L. & N. R. Co. v. Dickerson, 191 Fed. 705,  
711, (C. C. A.).

Phillips Co. v. Grand Trunk Ry. Co., 195 Fed.  
12, 19, (C. C. A.).

It had been laid down as a rule by the Commission (Conference Ruling, Bulletin No. 5, Rule 10) and recognized by the Courts, that any claim which had accrued at the time of the passage of the Act could be enforced, if presented within one year thereafter. In July, 1907, the petitioner had claims against the Railway Company dating back to 1901, and, under existing statutes, those claims were not barred when the amendment of 1906 took effect nor when the claim was filed with the Commission; and yet the Circuit Court of Appeals has held, in this case, that all claims more than two years old were cut off by this amendment. In that conclusion, it clearly disregarded the well-settled principle, that a statute of limitations is unconstitutional if it does not permit a reasonable time for enforcing an existing claim.

Cooley on Constitutional Limitations, (7th Ed., 523);

Sohn v. Waterson, 17 Wall., 596;

Terry v. Anderson, 95 U. S., 628.

Union Pac. R. Co. v. Laramie &c., 231 U. S.,  
190, 199.

And it also disregarded the plain intent and meaning of the statute which had previously been placed upon it by the Commission and the courts.

### VIII. Attorney's fees.

An important question, constantly arising under the Interstate Commerce Act, is involved in the present cases, namely, the awarding of attorney's fees.



The District Judge, in each case, on evidence given of the services, awarded \$10,000 for services before the Commission, and \$2500 for services in the action. Counsel for the Railway Company contended, in the Circuit Court of Appeals, that the District Court had no power to allow for services in the proceedings before the Commission. This question was not passed upon by the Circuit Court of Appeals, owing to its reversal of the judgment on other grounds.

The contention of the petitioner is that, under Section 8 of the Act, in every case where damages are awarded, the carrier is made liable for an attorney's fee to be fixed by the Court. This power may be exercised by the court at any time, whether an action is pending or not.

United States v. Bashaw, 50 Fed., 749 (C. A.).

If it is not fixed prior to the trial of the action provided for by Section 16, the court may then fix the amount at the same time that it fixes the fee under Section 16. On the respondent's contention, a carrier could always evade the liability under Section 8, by simply declining to obey the order of the Commission awarding damages, and thus compelling the shipper to bring an action under Section 16, where the power of the court would be limited to fixing a fee for services in the action. It is of great importance that this point should be decided, as shippers would be reluctant to institute a proceeding before the Commission, if the entire burden of expense were thrown upon them, contrary to the intention of the statute.

Seaboard Air Line v. Seegers, 207 U. S., 73, 77-8.

IX. The importance to the public of the questions

involved in the present case requires no special emphasis, in view of what has already been said. In an administrative law, having the wide-spread and far-reaching effects of the Interstate Commerce Act, there should be nothing left in doubt, so far as the courts have the power to aid the Commission; and where the doubt is raised by a judicial decision, contrary to the understanding and long settled practice of the Commission, it is particularly desirable that it should be removed without delay. The Commission may make regulations and lay down rules for the guidance of carriers and shippers; but the only certainty that the law will be complied with rests in the power conferred upon the shippers to obtain speedy and inexpensive redress in case the carriers disregard the duties which the law imposes upon them. If the Circuit Court of Appeals is correct in the conclusion reached by it in the present case, the law has clearly failed to give the protection to shippers which Congress obviously intended to confer, and it should be amended without delay.

WILLIAM A. GLASGOW, JR.,

JOHN A. GARVER,

*Counsel for Petitioner.*

Washington, March, 1914.

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*In the Supreme Court of the United States.*

OCTOBER TERM, 1913.

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IN THE MATTER OF THE PETITION OF HENRY  
E. MEERER.

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BRIEF FOR INTERSTATE COMMERCE COMMISSION IN  
SUPPORT OF APPLICATION FOR WRITS OF CERTIO-  
RARI TO THE UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE THIRD CIRCUIT.

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JOSEPH W. FOLK,  
CHARLES W. NEEDHAM,  
*Counsel for Interstate Commerce Commission.*

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# In the Supreme Court of the United States.

OCTOBER TERM, 1913.

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IN THE MATTER OF THE PETITION OF HENRY E.  
MEEKER.

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BRIEF FOR INTERSTATE COMMERCE COMMISSION IN  
SUPPORT OF APPLICATION FOR WRITS OF CER-  
TIORARI TO THE UNITED STATES CIRCUIT COURT  
OF APPEALS FOR THE THIRD CIRCUIT.

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## STATEMENT.

The Interstate Commerce Commission begs leave to file this brief in support of the petition for writs of certiorari above set forth.

The Commission takes this action because of the embarrassment it would labor under in carrying out the provisions of the act to regulate commerce unless the questions decided by the opinion of the Circuit Court of Appeals of the Third Circuit in these cases are speedily reviewed by this court, and a harmonious and correct conclusion as to the meaning of the act to regulate commerce is established by the decision of this court.

## I.

In its first opinion in these cases the Circuit Court of Appeals of the Third Circuit, at page 20 (reaffirmed in the second opinion), says:

As to these documents thus admitted in evidence, it is apparent that the requirement of section 14 that "in case damages are awarded such report shall include the findings of fact on which the award is made," has not been complied with by any express findings of fact in the supplemental report of May 7, 1912, in which the award of damages against the defendant is made; that such findings of fact, if any, must be looked for in the voluminous pages of the original report filed June 8, 1911, to which reference is made in the supplemental report; and that in said original report there are no findings of fact as such, and they must be gathered, if gathered at all, from a mass of recited evidence, statements, opinions, and conclusions of the Commission, all of which were irrelevant to an award of actual pecuniary damages.

At page 17 of its first opinion (reaffirmed) the court said:

The imperative command of section 14 that, in case damages are awarded, such report shall include the findings of fact on which the award is made, evidently contemplated a distinct enumeration of such findings by the Commission with reference to their proposed use in a jury trial.

The uniform construction of section 14 by this Commission in the discharge of its duties has not been

in accordance with this conclusion of the Third Circuit Court of Appeals. Under section 14 the Commission is required "whenever an investigation shall be made" by it, "to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall *include the findings of fact on which the award is made.*"

The Commission has never construed this section of the act to require it to make "a distinct enumeration of such findings," but that the findings of fact of the Commission should be included in its report along with its conclusions and decisions. If, therefore, the decision of the Circuit Court of Appeals of the Third Circuit is correct, it will require an entire reversal of the practice of the Commission in the form of its reports, and indeed might render the reports heretofore made in cases of this character of doubtful evidential value.

## II.

In its first opinion the Third Circuit Court of Appeals, at page 27 (reaffirmed in its second opinion), also takes the position that "the difference between what is found by the Commission to be the unreasonable tariff rate, and that fixed as a reasonable one," can not "be made the measure of the damage that the plaintiff has suffered," but that there must be additional proof before the court of some other actual damage; and at page 22 of its



first opinion (reaffirmed in the second opinion) the learned court says:

The injustice must be apparent of permitting an individual shipper, after procuring upon its own complaint a reduction of rate for the future, in the interest of the public generally, to secure for himself, by way of reparation, the difference between the new and the old rate which has already been charged to and paid by the consumer.

This conclusion of the Circuit Court of Appeals as to the measure of damage to govern the award of reparation to a complainant who has been charged an unreasonable rate is in conflict with the uniform construction put upon the act by the Commission since its creation. It is also in conflict with the opinions of the Circuit Court of Appeals of several other circuits, and is not in accord with the opinions of this court wherein the measure of damage used by the Commission has been cited with approval. The present conclusion of the Circuit Court of Appeals for the Third Circuit upsets the established rule which has heretofore governed the Commission, thus leaving the matter in such confusion as will embarrass the Commission in its effort to carry out the duties imposed upon it under the act to regulate commerce.

### III.

With reference to the statute of limitations the Circuit Court of Appeals for the Third District held that "the Commission in this case had no jurisdiction to entertain a claim of the shipper accruing prior to

July 7, 1905," the date at which the complaint was filed in this case before the Commission. There was no amendment to the act prior to the amendment of 1906, at which time section 16 was amended to read as follows:

All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit court, or State court, within one year from the date of the order, and not after: *Provided*, That claims accrued prior to the passage of this act may be presented within one year.

The construction placed upon this limitation by the Commission, and which it has consistently enforced, is found in its conference ruling, Bulletin No. 5, Rule 10, as follows:

Claims filed with the Commission since August 28, 1907, must have accrued within two years prior to the date when they are filed; otherwise they are barred by the statute. Claims filed on or before August 28, 1907, are not affected by the two years' limitation.

This construction of the statute of limitations by the Commission, which has been enforced in a number of cases before it, has been approved by the Circuit Court of Appeals for the Sixth Circuit, and by this court in the case of *Great Northern Ry. Co. v. United States*, 208 U. S., 452, 468.

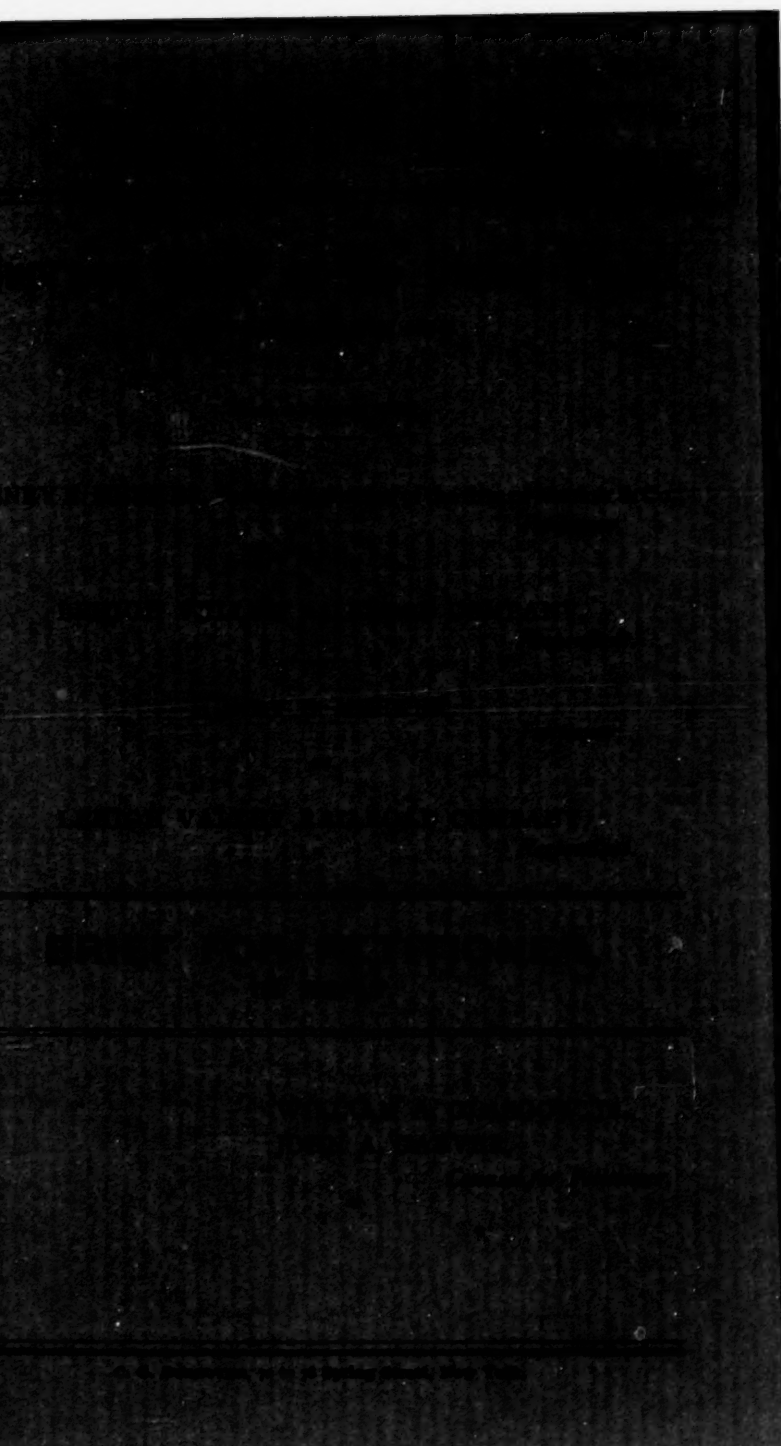
It is of grave importance that the act to regulate commerce should be finally and clearly construed by this court in order that the rights of litigants before the Commission may be definitely determined. We therefore respectfully submit that not only the interest of shippers demands an expeditious review of the decision of the Circuit Court of Appeals of the Third Circuit above referred to, but that such course is necessary in order that the Commission shall properly perform the work which it is required to do under the act to regulate commerce.

JOSEPH W. FOLK,

CHARLES W. NEEDHAM.

*Counsel for Interstate Commerce Commission.*





# Supreme Court of the United States,

OCTOBER TERM, 1914.

HENRY E. MEEKER, surviving partner of the firm of Meeker & Co.,  
*Petitioner,*

AGAINST

LEHIGH VALLEY RAILROAD COMPANY,  
*Respondent.*

(No. 434)

HENRY E. MEEKER,  
*Petitioner,*

AGAINST

LEHIGH VALLEY RAILROAD COMPANY,  
*Respondent.*

(No. 435)

Brief for Petitioner,  
*in reply.*

It is believed that the points which the respondent's counsel attempt to make in their brief have been fully met in the petitioner's original brief. It may, however, be helpful to the Court to direct its attention to a few of the statements made and arguments advanced in the respondent's brief.

### **Statement of Fact.**

I. It is noteworthy that respondent concedes (brief, p. 8) that "in making the supplemental order (order of reparation) the Commission *sought to comply* with Section 16."

The Commission at least meant well, and did not intend to mislead the petitioner or to do a vain thing.

II. In attempting to summarize the pleadings, the statement is twice made (brief, p. 10), that the petitioner alleged that it was charged higher rates than the Lehigh Valley Coal Company, and that if Meeker & Co. had received the same treatment as that Company, they "would have saved" the sum for which judgment was demanded.

Counsel's zeal has lead them to an inference or "conclusion" rather than to the statement of a fact. What the petitioner did allege was (Record, p. 6), that, by the discrimination in favor of the Lehigh Valley Coal Company, the defendant "unlawfully and unjustly exacted from the petitioner" the sum claimed.

### **P O I N T S .**

#### **FIRST.**

##### **Respondent's First Point.**

I. While setting forth the findings of the discrimination and excessive rates (brief, p. 5), the respondent contends (brief, pp. 25, 27, 35) that these were not findings of fact at all but mere "conclusions", unsupported by any findings of fact.

This contention is completely disposed of in the Fourth Point of respondent's brief, where it is argued that Section 16

is unconstitutional, because it makes the findings of the Commission *prima facie* evidence. Thus, these findings which, for the sake of the argument in the First and Second Points, are slightly referred to as conclusions, are, in the Fourth Point, brought forward as findings of fact upon which the jury should have been allowed to pass! Language could not be more explicit than that employed by respondent's counsel on this point, which is as follows (brief, p. 57) :

"The issues of fact which the Commission and Congress intended to preserve for trial by jury, are the issues : (a) Has the carrier committed a wrong whereby the shipper has sustained injury? (b) If so, to what amount of damages does the fact and nature of the injuries entitle the shipper?"

As pointed out in our original brief (p. 48), the Court below made the same admission, after it had assumed that the award of damages was a conclusion of law and not a finding of fact.

II. Equally vain is the attempt to argue that there was no evidence before the Commission on which the finding of discrimination could be based. If respondent's counsel desired to make that contention, they should have put in evidence the record before the Commission. They will not be permitted to argue that there was no evidence to support the finding even if it should be assumed, for the sake of the argument, that the Commission, in its opinion, did not see fit to refer to the evidence, or gave an erroneous reason for its conclusion. A judgment may be sustained on grounds other than those relied upon by the lower court.

Ostrander v. Hart, 130 N. Y., 406, 413 ;

Smiley v. Barker, 83 Fed., 684, 687 ;

Gibson v. Luther, 196 Fed., 203, 205.

In the absence of the record, an appellate tribunal will certainly not assume the non-existence of a fact in that record for



the purpose of reversing the judgment. The opinion of the Commission, however, clearly shows that there was evidence sufficient to justify their conclusion. The Commission found that the Lehigh Valley Coal Company was a mere appendage of the Railroad Company (record, pp. 22-23, 46), so that anything done by the Coal Company was, in reality, done by the Railroad Company.

III. The extent to which counsel allowed themselves to be carried in endeavoring to create the impression that there was no evidence to support the finding of discrimination is seen in their statement (brief, p. 15) that "there is nothing to show that *any* of the coal purchased by the Lehigh Valley Coal Company was ever shipped to Perth Amboy (the tidewater point)." The Commission found otherwise, as it said (Record, p. 46) :

" The proportion of the total tonnage from the anthracite field shipped by the Lehigh Valley Coal Company does not appear, but it is of record that it ships about 95% of the coal to tidewater."

IV. Only a case of desperation would have led counsel to advance the argument (brief, p. 23), that the Commission did not find that the rate charged subsequent to August, 1901, and prior to the date of their report, was excessive, but that the finding made referred only to existing conditions.

The issue raised by the pleadings comprised the entire period ; and the report of the Commission was clearly intended to cover that period, as is evident not only from its discussion of the facts, but in the award of reparation. This was the view taken by the Court below (R., p. 115).

## **SECOND.**

### **Respondent's Second Point.**

Respondent's Second Point is merely a discussion of the general question of damages. It is not a consideration of the question whether the findings of damage made by the Commission constituted *prima facie* evidence, under Section 16. The International Coal case is relied upon, as it was in the Court below; but, as pointed out in our original brief (pp. 24, 32), it is not in point, because it was an action at common law and not under Section 16, which expressly defines what shall constitute *prima facie* evidence.

## **THIRD.**

### **Respondent's Third Point.**

The contention that the admission of the reports of the Commission constituted prejudicial error, because the reports contained matter irrelevant to the issues, is without merit; because, on the evidence properly before the jury, the Court would have been obliged to set aside a verdict in favor of the defendant. In other words, the verdict would have had to be in favor of the plaintiff, even if the evidence objected to had been excluded. Had the defendant presented competent evidence in support of its defense, so as to entitle it to go to the jury on the issues, it might possibly have been in position to complain of the admission of irrelevant matter; but not having done so, it is in no position to complain.

## **FOURTH.**

### **Respondent's Fourth Point.**

In their Fourth Point, counsel for the respondent contend that Section 16 is unconstitutional because it deprives the carrier of its right to a trial by jury. Nearly one-fourth of the respondent's entire argument is devoted to this point, which is certainly an indication that counsel thoroughly appreciated the weakness of their other contentions.

If Section 16 should be held unconstitutional, the effect would be to rob the entire Act of all its vitality, so far as the rights of shippers are concerned, and to make their lot much more precarious than it was under the common law. For, wherever unreasonable rates were complained of, the shippers would be obliged, under the decisions of this Court, to proceed, in the first instance, before the Commission, and obtain the decision of that tribunal on the question; and, having been put to that trouble and expense, they would find that it had all been in vain, and that they must proceed with their action in court just as though no finding had been made by the Commission. It is late in the day to make such an attack upon the statute; and our legislative bodies would, indeed, be impotent if they could not even prescribe rules of evidence.

## **FIFTH.**

### **Respondent's Fifth and Sixth Points.**

In these Points, respondent seeks to sustain the ruling made by the Court below on the question of the Statute of Limitations.

I. Where the shipper is required or chooses to complain to the Commission in the first instance, before commencing an

action, the limitation prescribed in Section 16 is controlling and applies not only to the proceeding before the Commission, but to the subsequent action following the award of the Commission. If, therefore, the claim is not barred by the provisions of Section 16 at the time of filing the complaint with the Commission, it cannot be barred by any subsequent lapse of time, provided the action is commenced "within one year from the date of the order" of the Commission. Consequently, neither the six year statute of Pennsylvania, nor the five year statute prescribed by Section 1047 of the Revised Statutes, was applicable after the amendment of Section 16, in 1906. Indeed, Section 1047 was never applicable to an action by the shipper under Section 16 to recover damages, as such an action is not one to recover a penalty.

Lehigh Valley R. Co. v. Clark, 207 Fed., 717, 731.

Pennsylvania Railroad Co. v. International Coal Co., 230 U. S., 184, 199-200.

II. There is no ambiguity in the amendment of 1906 which justifies a resort to the debate in Congress to ascertain what was intended.

Pennsylvania Railroad Co. v. International Coal Company, 230 U. S., 184, 199.

But, on the record relied upon by respondent's counsel, it is very evident that Congress meant exactly what it said, in allowing claims that had previously accrued, even if more than two years old, to be presented within a year after the Act took effect. The telegram relied upon as showing a contrary intention is thus set forth in the respondent's brief (bottom of p. 85):

"Cattlemen's claims for reparation have been accruing; three (*sic*) years limitation clause by Hepburn Bill possibly bars prior two years; insert amendment allowing one year to file accrued claims before Commission."

Counsel were so uncertain as to the meaning of this telegram, that they were obliged to resort to the inevitable "sic." That is because they chose to punctuate the telegram in a way to suit themselves. Telegrams, when received, bear no punctuation marks ; and the manner in which this particular telegram should have been punctuated and read, so as to dispose of the " sic ", is as follows :

" Cattlemen's claims for reparation have been accruing three years. Limitation clause by Hepburn Bill possibly bars prior two years. Insert amendment allowing one year to file accrued claims before Commission."

In other words, the telegram, properly read, clearly shows the intention to permit claims more than two years old (in that case three years) to be filed, if they were presented within a year after the Act took effect.

III. The case of Louisville & Nashville R. R. Co. v. Dickerson, 191 Fed., 705, has been repeatedly misconstrued in the respondent's brief (pp. 80-81, 83). In that case, claims accruing prior to the passage of the Act were presented to the Commission within two years after their accrual, but more than a year after the passage of the Act. Both the Commission and the Court very properly held that the proviso, permitting accrued claims to be presented within a year, did not cut down the two years allowed for the presentation of claims, whether they accrued before or after the passage of the Act. This decision was not only entirely consistent with the previous interpretation of the statute by the Commission, but the Court took pains to approve specifically the Commission's interpretation, as is shown by the quotation from the opinion at the bottom of page 83 in the respondent's brief.

IV. When Congress expressly provided that existing claims might be presented within one year after the passage

of the Act, it clearly intended that the shipper should have a year and not ten months in which to file his claim. The construction contended for by the respondent would defeat the legislative intent, as the effect of the Joint Resolution was to make the amendment effective only on the date fixed, that is, sixty days after the passage of the Act. There was no valid amendment in force until that date. If it should be claimed that the amendment became effective on June 29, 1906, the date of the original passage of the Act, the effect was certainly suspended the following day, by the passage of the Joint Resolution, and the result was precisely the same as if the original Act had provided that it should not become effective until sixty days thereafter.

## **SIXTH.**

### **Counsel fees.**

No serious attempt has been made to meet the argument contained in our original brief (p. 59), on the award of counsel fees. To characterize them as invalid and excessive is not to show that they are so.

## **SEVENTH.**

### **Reparation as a "judicial preference or rebate."**

A prejudicial atmosphere is sought to be thrown about these cases by referring slightly to an award of reparation as constituting a judicial preference, contrary to the spirit of

the Act. It is argued (p. 42) that the published rate established at any one time is the only lawful rate, and that, since this rate is the same for all shippers, a shipper in fact suffers no damage, although the Commission may afterwards find that the rate was unreasonably high. The mere publication of a rate does not, however, make it lawful; and this kind of reasoning necessarily leads to the conclusion that a shipper should never recover damages for excessive charges, since all shippers paid such charges and presumably were reimbursed by the consumers. The provisions of the Act authorizing the recovery of damages in such cases must, consequently, be disregarded.

To call an award of reparation a judicial preference or rebate is a mere bit of rhetoric. The remedy is open to all shippers who are willing to insist upon their rights; and the very fact that some shippers are willing to go to this trouble and expense is in itself a powerful influence in protecting small shippers who may find it cheaper to acquiesce in extortionate rates rather than litigate the question before the Commission and the courts. If some shippers insist upon their rights, all shippers are more likely to be secured in the enjoyment of their rights.

Washington, October 13, 1914.

WILLIAM A. GLASGOW, JR.,

JOHN A. GARVER,

Counsel for Petitioner.



Office Supreme Court, U. S.

FILED

OCT 14 1914

JAMES D. MAHER  
CLERK

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**In the Supreme Court of the United States.**

OCTOBER TERM, 1914.

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No. 434.

HENRY E. MEEKER, SURVIVING PARTNER OF THE  
FIRM OF MEEKER & Co., PETITIONER,

v.

LEHIGH VALLEY RAILROAD COMPANY, RESPONDENT.

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No. 435.

HENRY E. MEEKER, PETITIONER,

v.

LEHIGH VALLEY RAILROAD COMPANY, RESPONDENT.

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BRIEF FOR THE PETITIONER SUBMITTED ON BEHALF  
OF THE INTERSTATE COMMERCE COMMISSION.

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JOSEPH W. FOLK,  
CHARLES W. NEEDHAM,  
*Counsel for the Commission.*



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1874

1874

# In the Supreme Court of the United States.

COURT TERM, 1914.

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HENRY E. MEEKER, SURVIVING PARTNER OF the firm of Meeker & Co., petitioner, v. LEHIGH VALLEY RAILROAD COMPANY, RE- spondent.	} No. 434.
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HENRY E. MEEKER, PETITIONER, v. LEHIGH VALLEY RAILROAD COMPANY, respondent.	} No. 435.
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*CERTIORARI TO REVIEW JUDGMENT OF REVERSAL BY THE  
UNITED STATES CIRCUIT COURT OF APPEALS FOR THE  
THIRD CIRCUIT.*

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## BRIEF SUBMITTED BY THE INTERSTATE COMMERCE COMMISSION.

These cases involve questions of law in which the Interstate Commerce Commission is directly interested. They affect procedure before the Commission and determine the status and evidential value of the Commission's reports and orders granting reparation to shippers in interstate commerce who

have been injured by violations of the provisions of the act to regulate commerce by interstate carriers.

#### QUESTIONS OF LAW.

1. In cases where damages are awarded by the Commission, what "findings of fact" must be included in the report of the Commission and how must these findings be stated?

2. Where a carrier does not comply with an order of the Commission for the payment of money, and suit is brought in the District Courts of the United States "for the enforcement of" such order, what evidential value do the reports and orders of the Commission have upon the trial of the cause in the District Court—

(a) Where the damages awarded are for the violation of section 2 of the act to regulate commerce?

(b) Where the damages awarded are for charging an unreasonable rate in violation of section 1 of the act?

3. What is the "measure of damages" in each of the foregoing cases (a) and (b)?

#### STATEMENT OF FACTS.

Henry E. Meeker and Caroline H. Meeker were copartners trading as Meeker & Co., engaged in the business of buying, shipping, and selling anthracite coal. During the pendency of the proceedings before the Commission, Caroline H. Meeker died, and the cause was prosecuted in the name of the

surviving partner. At a later period, Henry H. Meeker carried on the business in his own name, and the second suit was commenced. The firm—and afterwards Meeker—bought coal in what is known as the Wyoming coal region of Pennsylvania, from which point a blanket rate applied to tidewater, Perth Amboy, N. J., over the line of the Lehigh Valley Railroad Co., a distance of approximately 165 miles. They shipped their coal over the railroad and sold it to customers in New York City and vicinity, their place of business being in the city of New York.

On July 17, 1907, Meeker & Co. filed a complaint with the Interstate Commerce Commission (hereinafter referred to as the Commission), in which they alleged—

(1) That the Lehigh Valley Railroad Co. had unlawfully discriminated against them in rates charged upon coal shipped between November 1, 1900, and August 1, 1901; and

(2) That the railroad company had, subsequent to August 1, 1901, and prior to the filing of the complaint, charged them unreasonable and excessive rates for the transportation of coal to Perth Amboy.

The complaint asked the Commission to determine—

(1) Whether the complainants had been unduly discriminated against prior to August 1, 1901;

(2) Whether the rates charged since August 1, 1901, were unreasonable; and

(3) If the rates so charged were unreasonable, to fix the reasonable rates that ought to have been charged complainants, and which should be charged in the future.



The complaint then asked for reparation for damages sustained—

(1) On account of the undue discrimination prior to August 1, 1901; and

(2) On account of the payment of unreasonable rates subsequent to that date.

Due proceedings were had upon said complaint; a full hearing was accorded to the complainants and the railroad company; a large amount of testimony was taken upon all of the questions involved, and arguments were made and briefs filed by both parties to the controversies. On June 8, 1911, the case, excepting the amount of reparation, was decided by the Commission. A report was filed as required by the act, stating the Commission's conclusions together with its decision and an order directing the railroad company to cease and desist from charging certain specified rates, "which said rates have been found by the Commission in its said report to be unreasonable," and requiring the carrier to establish, on or before a date named, "and for a period of two years thereafter to maintain and apply to the transportation of anthracite coal, in carloads, from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., rates not in excess of" rates named, "which said rates have been found by the Commission in said report to be reasonable." (Rec., 434, p. 48.)

The report also found that the railroad company from November 1, 1900, to August 1, 1901, had accorded to the Lehigh Valley Coal Co. lower rates than those charged to the complainants for a like and contemporaneous service.

It appears by the report that for some time prior to November 1, 1900, the published rates were currently charged to all shippers, and, under what was known as "the 60 per cent contract," all rate payments were adjusted monthly on the basis of allowing operators 60 per cent of the average price of the highest grade of coal at tidewater, and 40 per cent of this price was the "adjusted" freight rate charged to all shippers. Meeker & Co. received the benefit of the adjusted rates prior to November 1, 1900. At this date a change was proposed increasing the percentage to the operators, thereby lowering the percentage of the adjusted rate. Negotiations went on with the understanding that when the matter was settled the percentage agreed upon should apply from November 1, 1900. The matter was finally settled by increasing the allowance to the operators to 65 per cent. Settlements were then made on this basis from November 1, 1900, with all operators except Meeker & Co. They had paid the published rate, as others had done, but were refused the "adjusted rate." This constituted the ground of the complaint of undue discrimination.

These facts are important in determining the measure of damage to apply upon this case.

From all the evidence and the circumstances of this case the Commission found:

We are of the opinion, and so hold, that complainants have sustained the allegation of unjust discrimination under the second sec-

tion of the act. Reparation, with interest from August 1, 1901, will be awarded on this count. (Record, No. 434, p. 23; 21 I. C. C. Rep., p. 137.)

\* \* \* \* \*

We are further of opinion that reparation should be awarded upon basis of the rates herein found to be reasonable upon all shipments of coal by complainants from the Wyoming region to Perth Amboy since August 1st, 1901. (Record, No. 434, pp. 47, 48; 21 I. C. C. Rep., p. 163.)

The report then concludes (same pages):

The amount of reparation which should be awarded under our findings in this case cannot be ascertained from the exhibits now on file, and such further proceeding will be had as may be necessary to determine the amount of money due to complainants.

Subsequent hearings were had by the Commission, participated in by both parties, and on May 7, 1912, the Commission filed its supplemental report with specific findings upon the reparation due to the complainant. This report states:

A further hearing has been held, and complainant has presented exhibits showing the total number of tons of each variety of coal shipped and the amount of reparation due on such shipments. These exhibits have been examined by defendant and admitted to be correct. \* \* \*

The exhibits showing details respecting the shipments upon which reparation is

asked are too extensive to be set forth in this report. But inasmuch as the accuracy of the figures in said exhibits respecting the shipments made, freight charges paid, and reparation due, is conceded of record by defendant, we deem it unnecessary to make detailed figures respecting the numerous shipments involved. (Record, No. 434, pp. 11, 12; 23 I. C. C., pp. 480, 482.)

The supplemental report recites:

In our original report we found that the rates charged complainant for the transportation of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., during the period from November 1, 1900, to August 1, 1901, were unjustly discriminatory, in violation of section 2 of the act, to the extent that they exceeded the rates contemporaneously charged the Lehigh Valley Coal Co. under the contract then in effect between that company and the defendant; and we further found that the rates in effect from August 1, 1901, to July 17, 1907, were unreasonable to the extent that they exceeded rates of \$1.40 per gross ton on prepared sizes, \$1.30 on pea, and \$1.15 on buckwheat. (Record, p. 11; 23 I. C. C., 481.)

The report then states the number of tons of each size shipped by the complainant between November 1, 1900, and August 1, 1901, the amount of charges paid thereon "at the rates found to have been unjustly discriminatory," and finds—

that complainant has been damaged to the extent of the difference between the amount

which he did pay and \$118,979.85, the amount which he would have paid had he been given the benefit of the rates applied by defendant to similar shipments of the Lehigh Valley Coal Co.; and that he is therefore entitled to an award of reparation in the sum of \$11,009.33, with interest thereon from August 1, 1901.

The report then gives like statistics and date regarding the shipments from August 1, 1901, to July 17, 1907, and finds—

that the complainant has been damaged to the extent of the difference between the amount which he did pay and \$626,945.62, the amount which he would have paid at the rates found reasonable, less \$193.20 deducted by stipulation of all parties on account of certain claims already paid; and that he is therefore entitled to an additional award of reparation in the sum of \$58,236.45, with interest, amounting to \$27,750.64 on the individual charges comprising said sum from the dates of payment thereof to September 1, 1911, together with interest on said sum of \$58,236.45 from September 1, 1911.

The foregoing was under the petition filed by Meeker & Co., known as No. 1180 on the Commission's docket. Henry E. Meeker subsequently filed a petition known as No. 3235 on the Commission's docket. The latter case was filed April 13, 1910, and attacked the same rates and asked for reparation to the date of the complaint. For the discussion of the questions involved in this brief

it is sufficient to say that there was a like finding upon this petition specifying the total shipments, payments, etc., and finding—

that he is, therefore, entitled to an award of reparation in the sum of \$10,813.60 with interest amounting to \$1,526.53 upon the individual charges comprising said sum from the dates of payment thereof to September 1, 1911, together with interest on said sum of \$10,813.60 from the 1st day of September, 1911 (pages last referred to).

An order of reparation was entered in case No. 1180, the report being made a part of the order, directing the railroad company—

to pay unto complainant, Henry E. Meeker, on or before the 15th day of July, 1912, the sum of \$11,009.33, with interest thereon at the rate of 6 per cent per annum from the 1st day of August, 1901, as reparation for unjustly discriminatory rates \* \* \* as more fully and at large appears in and by said report of the Commission.

It is further ordered (that they pay the several sums named) as reparation for unreasonable rates charged \* \* \* which rates so charged have been found by this Commission to have been unreasonable, as more fully and at large appears in and by said report of the Commission. (Record, No. 434, p. 13.)

A similar order was entered on the ground of unreasonable rates in case No. 3235. (Record, 434, p. 14.)

The railroad company did not comply with these orders, and in September, 1912, the two actions at bar were commenced against the company in the United States District Court for the Eastern District of Pennsylvania. The railroad company pleaded—

not guilty, and further pleads the bar of the statute of limitations applicable to plaintiff's claim; and for further plea in this behalf the defendant avers that the Interstate Commerce Commission has no jurisdiction to make the findings and order of reparation which the plaintiff seeks to enforce by this proceeding; and further, that there was before the Commission no substantial evidence to sustain said findings and said order. (Record, No. 434, p. 49.)

Upon the hearing in the District Court, the plaintiff offered in evidence the reports and reparation orders of the Commission, together with proof of noncompliance by the railroad company with the Commission's orders. The District Court, in effect, charged that the reports and orders made a *prima facie* case, and a verdict was rendered in accordance therewith. Judgments were entered on the verdict, and appeal was taken to the Circuit Court of Appeals for the Third District. The Circuit Court of Appeals reversed the judgments on the ground that the reports of the Commission were irregular upon their face, and were not *prima facie* evidence of the ultimate facts set forth in the re-



port, that the plaintiffs had been injured, and the extent of the damage sustained. The Court of Appeals further held the statute of limitations was a bar to recovery by the plaintiff. The cases are brought here on writ of certiorari for review by this court.

#### ARGUMENT.

#### I.

##### **Findings of fact on which the award is made.**

Section 14 of the act to regulate commerce, after providing that it shall be the duty of the Commission, after an investigation, to make "a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises," adds—

*And in case damages are awarded such report shall include the findings of fact on which the award is made.*

The learned judge, writing the opinion for the Circuit Court of Appeals for the Third Circuit in these cases, criticizes the "findings of fact" in the report of the Commission. In the first opinion (Record, No. 434, p. 113) he said:

The imperative command of section 14 that in case damages are awarded such report shall include the findings of fact on which the award is made evidently contemplated *a distinct enumeration of such find-*

*ings* by the Commission with reference to their proposed use in a jury trial (p. 122).

\* \* \* No function of a trial judge in such a case could be more exigent than that of pointing out to a jury, in a case where no separate and distinct findings of fact had been made in the report of the Commission, *what are properly to be considered such findings* (pp. 122, 123).

After referring to the findings in the report and supplemental report, the court says:

As to these documents thus admitted in evidence, it is apparent that the requirement of section 14 \* \* \* *has not been complied with by any express findings of fact in the supplemental report of May 7, 1912, in which the award of damages against the defendant is made; that such findings of fact, if any, must be looked for in the voluminous pages of the original report filed June 8, 1911, to which reference is made in the supplemental report; and that in the said original report there are no findings of fact as such, and they must be gathered, if gathered at all, from a mass of recited evidence, statements, opinions, and conclusions of the Commission, all of which were irrelevant to an award of actual pecuniary damage* (p. 124).

In the second opinion (Record, No. 434, p. 133), the learned judge said:

The reparation report of May 7, 1912, *contains no findings of fact \* \* \* and is silent as to the information and evidence*

*that may have been adduced before it relevant to that claim (p. 145).*

\* \* \* \* \*

A careful reading of the fifty pages of this report *does not disclose any specific findings of fact bearing on the award of reparation other than the undisputed tonnage shipped by complainant.* The report is occupied entirely with a discussion of the evidence adduced before it on the charges of discrimination and unreasonableness (p. 146).

In the last opinion, after the rehearing (Record, 434, p. 151), the learned judge said:

*In the present case we have the unquestioned finding of the Commission, that the rates charged were unreasonable and that a certain lower rate was reasonable, and the difference between the two was expressly and avowedly awarded as damages to the plaintiff (p. 158).*

\* \* \* \* \*

It is true that the law makes an exception to the ordinary rule of evidence in such cases by providing that facts stated in the findings and order of the Commission need not again be proved by the plaintiff, the finding and order being made *prima facie* evidence of such facts. *Such facts may or may not be relevant to the question of the liability for or the amount of damages claimed. Their evidential value in this respect is for the court and jury trying the case.* \* \* \* If the intent of the legislative mind had been to go further and make

not only the findings of facts and order prima facie evidence of the facts stated, but also the conclusions of the Commission on the facts prima facie evidence of the liability of the defendant for the amount of damages stated in the order, such intent should and would have found expression in the act.

\* \* \* If more were wanted, we might refer to the language of section 14, which emphasizes the distinction between the "conclusions" of the Commission and "the findings of fact on which the award is made" (p. 157).

\* \* \* \* \*

The sixteenth section nowhere says that the report, findings, or order of the Commission are prima facie evidence of the liability of the defendant or of the amount of such liability. It only says \* \* \* that the findings and order of the Commission "shall be prima facie evidence of the facts therein stated," but clearly such facts are not made prima facie evidence of anything.

\* \* \* \* \*

In view of this it would seem almost an abuse of language to say that the "facts" of which the findings and order of the Commission are prima facie evidence, including the conclusions arrived at by the Commission as to the injury of the plaintiff and the amount of damages sustained. \* \* \*

What those damages may be is a question of fact to be determined by the jury, and not a question of law.

The foregoing extracts may be illuminated by reading the discussion upon other questions, particularly the question of measure of damages. It seems fair to conclude, however, that the learned judge held:

(1) That there must be "a distinct enumeration of" findings.

(2) That these findings are to be of primary facts upon which the Commission reached its conclusions, but that the provision of section 16 does not include the ultimate facts, namely, that the plaintiff was injured, and the extent of the injury. These ultimate facts, he seems to hold, are not included within the term "findings of fact" which were to make out a *prima facie* case.

This leads to the question, what are "findings of fact" in legal procedure; that is, what is meant by that phrase? For it must be assumed that Congress used the phrase in its ordinary and well-understood signification. Section 649 of the Revised Statutes uses this phrase:

The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury.

This court, speaking through Mr. Justice Miller, and referring to this provision, said:

This special finding has often been considered and described by this court. It is not a mere report of the evidence, but a statement of the ultimate facts on which the law

of the case must determine the rights of the parties, a finding of the propositions of fact which the evidence establishes, and not the evidence on which those ultimate facts are supposed to rest. (*Norris v. Jackson*, 76 U. S., 125, 127; *citing Burr v. Durham Co.*, 1 Wall., 99; *Graham v. Bayne*, 18 Howard, 62.)

The Supreme Court of Alabama, referring to findings of fact, speaking through Haralson, J., said:

A mere setting out of all the evidence in the case, conflicting and undisputed, as appears in the bill of exceptions, and rendering judgment thereon, does not constitute a finding of the issues of fact as required by the statute. The conclusion of the court as to what these facts establish within and responsive to the issues in the cause was what the court was required to find. (*Brock v. L. & N. R. Co.*, 21 Southern Rep., 994.)

The Supreme Court of Wisconsin said:

The term "finding" is universally used by the profession and by the courts as meaning the decision of the trial court upon the facts. (*Williams v. Giblin*, 57 Northwestern Rep., 1111, 1112.)

The Supreme Court of Nevada, referring to an act of that State, speaking through Belnap, J., said:

The findings of fact contemplated by the statute is the written statement of *each issuable fact established by the evidence*. From

these determined facts *the conclusion of law is deduced.* (*Elder v. Frevert*, 3 Pac. Rep., 237, 238.)

The learned judge, speaking for the Circuit Court of Appeals in these cases, recognizes, and expressly states that whether the plaintiff was injured by the carrier's violations of the statute and the amount of damages he has sustained are questions of fact. These questions, with others, were in issue before the Commission—issues raised by the pleadings. The finding that the plaintiff was injured and the extent of the injury were conclusions; and they were conclusions of fact. These conclusions did not constitute the award; the award was based upon and the result of these findings of fact, precisely the same as a judgment of a court is based upon the "findings of fact" made by the court where a jury has been waived, or by a jury when the case is submitted to a jury.

The issues of fact in these cases, whether tried by the Commission or by a court—conceding, as we do not, that the court could try all these questions—are:

(1) The status and relation of the parties, as shipper and carrier.

(2) The fact and the amount of the traffic carried.

(3) The amounts paid by the shipper for the transportation service.

(4) Whether the charges were unreasonable or unduly discriminatory.



(5) If the charges were unreasonable, what would have been a reasonable charge.

(6) Whether the plaintiff was injured by the payment of unreasonable rates and undue or unreasonably discriminatory charges.

(7) The amount of the damages sustained by the plaintiff as the result of the payment of unreasonable and unduly discriminatory charges.

If these constitute the issues, then the findings of fact must determine each one of the issues raised, and these determinations must be stated as findings, not in any precise words but in clear and legal effect. No other findings are required to be stated. The evidence upon these issues is not to be reported in order that the court or jury may judge whether the findings are correct. This applies to every one of the facts which must be found. All are *ultimate facts*, including the question of injury and the amount of damage sustained. This is clearly the decision of the courts in the cases cited.

*Intent of the act.*—This interpretation follows from an examination of the intent and purpose of the statute. The main purposes of the act to regulate commerce were to insure reasonable rates, equality of treatment to all shippers under like conditions, and to provide a simple, effective, and inexpensive method of obtaining redress for violations of the law. (*Texas & Pacific R. Co. v. Abilene Cotton Oil Co.*, 204 U. S., 426, 439; *New York, N. H. & H. R. R. Co. v. Interstate Comm. Comm.*, 200 U. S., 361, 391; *Robinson v. B. & O. R. R. Co.*,

222 U. S., 506, 509; *Mitchell Coal Co. v. Penna. R. R. Co.*, 230 U. S., 247, 257, 258.)

In the report of the Committee on Interstate Commerce of January 18, 1886, through the chairman, Senator Cullom, which is a review of the purposes of the act to regulate commerce, as originally passed by Congress, it is said (p. 214) :

Nor is it proposed to compel any citizen to rely solely upon the Commission recommended by this committee or to debar him from seeking redress from grievances from the judicial tribunals of the United States if he shall prefer to have recourse to them. On the contrary, it is expressly provided that he shall be free to pursue his remedy at common law or *under the statute herein recommended* at his own discretion. It is not proposed to in any manner restrict the choice of remedies now available, but it is proposed to provide *additional means of obtaining redress with much less difficulty* and expense and to render those already existing very much more effective.

This can best be accomplished, it is believed, *by making the reports and recommendations of the Commission prima facie evidence as to the facts found in all cases which it investigates.* This would do more towards placing the shipper upon an equality with the carrier in a legal controversy than anything else that has been suggested, and would to a considerable extent obviate the almost insurmountable difficulties now encountered by the shipper.

With such a change in the rules of evidence, a favorable report by the Commission *would substantially establish the case of the complainant, should judicial proceedings become necessary, as it would lift from his shoulders the burden of proof and transfer it to the carrier.*

The act to regulate commerce confers upon the Commission power to hear *and determine* the complaints of "any person or persons claiming to be damaged by any common carrier subject to the provisions of this act." (Sec. 9.) This language includes damages for injuries arising from *any* violation of the act; those arising from violations of section 2, as well as violations of section 1.

After hearing, the Commission is to "make an order directing the carrier to pay to the complainant the sum to which he is entitled, on or before a day named." (Sec. 16.) This a new remedy before a newly constituted tribunal. It determines the liability, and the carrier is in duty bound to pay the award.

But Congress is limited by the constitutional provision requiring trial by jury. No penalties, therefore, are provided for failure to comply with this class of orders, and the Commission is not authorized to issue any writs to compel the performance of any of its orders. For these reasons it was necessary to provide for a court procedure "for the enforcement of an order" for the payment of money (sec. 16), not by a proceeding in equity, but a proceeding that would give a jury

trial upon the questions that affected the property rights of the carrier *provided the carrier raised issues to be tried*, and offered evidence in support of its contentions. To meet this constitutional requirement, the case is to be commenced by a "petition setting forth briefly the causes for which he claims damages," and then adds to the requirements for the ordinary declaration or complaint that the petition shall set forth "the order of the Commission in the premises," thus advising the court that there has been a proceeding before the Commission regarding the matter complained of. Following the policy for expediting all cases in court affecting commerce, and casting the burden of the litigation upon the carrier, the act provides that "on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated." (Sec. 16.) Attorney's fees are also allowed in these cases. One can not carefully read the act in reference to the proceedings to be had in court regarding the enforcement of the act and for the recovery of damages for injuries caused by the violations of its provisions, without being impressed that the purpose in the mind of Congress was not only to compel obedience by severe penalties, but also to secure conformity by complete and quick remedies to shippers injured by any violations of the act.

Every act should be construed in the light of circumstances existing at the time the act was passed, and the intent of Congress be gathered from the

objects and purposes in view. (*Louisville & Nashville R. R. Co. v. Mottley*, 219 U. S., 467; *Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S., 426.)

In determining, therefore, what Congress meant by the use of the legal phrase "findings of fact," we must conclude, in the light of all the authorities, that it was to be a finding of all the *ultimate facts* raised by the pleadings *necessary to an award by the Commission or a judgment thereon by the court.*

The Commission is more than a jury. It finds the facts and also enters judgment thereon, and to its findings and judgment this court has ascribed—

the strength due to the judgments of a tribunal appointed by law and informed by experience. (*Ill. Cent. R. R. v. Int. Comm. Comm.*, 206 U. S., 441, 454.)

When its findings of ultimate facts are presented to the court in these cases, the court and jury have nothing to do but accept them as making a *prima facie* case for the plaintiff, provided always that every essential ultimate fact has been found by the Commission. If the Commission, in its report, has omitted an essential fact—for instance, that the plaintiff was injured, or the amount of the damages—then, of course, the report does not make out a *prima facie* case. But if all the essential facts—*ultimate facts*—are found which are necessary to the determination of the issues raised by a general denial of the plaintiff's complaint, then no further

proof is necessary in the first instance. It is a *prima facie* case.

The purpose of the act is clear. It was to cast upon the carrier the burden of defending a suit which had been necessitated by its failure to comply with the order of the Commission. These are not cases in which technical construction of rules of procedure are to be applied, or in which delays are to be tolerated. These cases are to be expedited and carriers are not to be permitted to interpose mere technical defenses to procedure before the Commission. The substantial rights of the carrier are fully protected. It can interpose any defense that goes to the merits of the controversy, and those defenses may be heard by the court and determined by the jury. But the railroad company is put upon its defense when the report and order containing the findings of the Commission are presented to the trial court.

*Prima facie case.*—"Prima facie evidence of a fact," says Mr. Justice Story—

is such evidence as, in judgment of law, is sufficient to establish the fact; *and if not rebutted, remains sufficient for the purpose; the jury are bound to consider it in that light*, unless they are invested with authority to disregard the rules of evidence by which the liberty and estate of every citizen are guarded and supported. (*Kelly v. Jackson*, 6 Pet., 622; *Reaffirming Carver v. Jackson*, 4 Pet., 1. See also *United States v. Wig-*

*gins*, 14 Pet., 344; *Tobacco v. United States*, 97 U. S., 237, 268.) \* \* \*

This virile statement by Mr. Justice Story is in strong contrast with the statement made by the learned judge writing the opinion in the court below, where he says:

In other words, the statute makes the finding or order *prima facie* evidence of certain facts, but it does not make, or attempt to make, such facts *prima facie* evidence of anything.

This court speaks positively upon the question:

The statute gives *prima facie* effect to the findings of the Commission. (Cinn., etc., Ry. Co. v. I. C. C., 206 U. S., 142, 154.)

The findings of the Commission are made by law *prima facie* true. (*Ill. Cent. v. I. C. C.*, 206 U. S., 441, 454; *I. C. C. v. Union Pac.*, 222 U. S. 541, 546.)

In the *Mitchell Coal case* (*supra*), Mr. Justice Lamar, referring to the orders of the Commission, said:

They are quasi judicial and only *prima facie* correct in so far as they determine the fact and amount of damage—as to which, since it involves the payment of money and taking of property, the carrier is, by section 16 of the act, given its day in court and the right to a judicial hearing (p. 258).

*Findings in the case at bar.*—The status and relation of the parties as shipper and carrier, and the points between which the service of carriage was



performed are clearly stated. There are three issues in this class of cases that must be determined by the Commission and upon which its decisions are final, namely:

(1) Is a discrimination "undue" or "unreasonable"?

(2) Are the carrier's rates unreasonable?

(3) If a rate is found by the Commission to be unreasonable, what would have been for a past period, and what will be for a future period, a *reasonable rate*?

All of these questions are for determination by the Commission. (*Texas & Pac. R. R. Co. v. I. C. C.*, 162 U. S., 197; *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U. S., 426; *Interstate Commerce Commission v. Illinois Central Railroad*, 215 U. S., 452, 475; *B. & O. R. R. Co. v. Pitcairne*, 215 U. S., 481; *Interstate Commerce Commission v. D. L. & W. R. Co.*, 220 U. S., 235, 251; *Interstate Commerce Commission v. Union Pacific R. Co.*, 222 U. S., 541, 547; *Interstate Commerce Commission v. L. & N. R. R. Co.*, 227 U. S., 88, 92, 100; *Penna. R. R. Co. v. International Coal Co.*, 230 U. S., 184; *Minnesota Rate Cases*, 230 U. S., 352; *Houston East & West Texas R. Co. et al. v. United States*, 234 U. S., 342; *Intermountain Rate Cases*, 234 U. S., 476.)

The original report is mainly given to a discussion of these questions which fall within the exclusive jurisdiction of the Commission. To be satisfactory to the parties, as well as to state clearly the position of the Commission upon the facts of these

particular cases, an exhaustive opinion is necessary. This report is able and comprehensive, and discusses these questions with great clearness *and states the ultimate facts arrived at by the Commission*. So clearly are these facts stated that the learned judge, writing the opinion for the court below, said:

In the present case we have the unquestioned finding of the Commission, that the rates charged were unreasonable, and that a certain lower rate was reasonable, and the difference between the two was expressly and avowedly awarded as damages to the plaintiff. (Record, 434, p. 158.)

He also concedes that the Commission found that the charges prior to August 1, 1901, were unduly discriminatory. Upon this branch of the case the Commission found:

From the facts disclosed \* \* \* [there] was therefore the equivalent of a readjustment of the freight rates upon the basis of the 65 per cent contract on such coal as was purchased by the Lehigh Valley Coal Co. and shipped to tidewater during the period from November 1, 1900, to August 1, 1901. *We are of the opinion, and so hold, that complainants have sustained the allegation of unjust discrimination under the second section of the act. Reparation, with interest from August 1st, 1901, will be awarded on this account.* (Record, 434, p. 23.)

This finding seems to be clear and explicit. If more is needed, we have only to turn to the order (p. 13).

*It is ordered*, That the defendant \* \* \* is hereby authorized and required to pay unto complainant, Henry E. Meeker, on or before the 15th day of July, 1912, the sum of \$11,009.33, with interest thereon at the rate of 6 per cent per annum from the 1st day of August, 1901, as reparation for unjustly discriminatory rates charged for the transportation of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., *which rates so charged have been found by this Commission to have been unjustly discriminatory*, as more fully and at large appears in and by said report of the Commission.

The original report also expressly finds that by reason of undue discrimination and the charging of unreasonable rates by the Lehigh Valley Railroad, the plaintiff *was injured* and was entitled to reparation or damages for these violations of the act.

In regard to the unreasonable rates charged subsequently to August 1, 1901, the Commission found:

After a careful study of defendant's exhibits relating to tonnage and cost of movement, as well as a painstaking analysis of defendant's voluminous exhibits regarding its past and present financial condition, *we are of opinion, and so find, that defendant's rates for the transportation of coal from the*

Wyoming region in Pennsylvania to Perth Amboy, of \$1.55 per gross ton on prepared sizes, \$1.40 on pea coal, and \$1.20 on buckwheat coal *are unreasonable so far as they exceed \$1.40 on prepared sizes, \$1.30 on pea coal, and \$1.15 on buckwheat.* \* \* \*

We are further of opinion that reparation should be awarded on basis of the rates herein found to be reasonable upon all shipments of coal by complainant from the Wyoming region to Perth Amboy since August 1, 1901. (Record, 434, pp. 47, 48.)

This is also repeated in the order.

These ultimate facts, then, are established by the original report. In the supplemental report, concerning the amount of the shipments, it is stated that an exhibit was presented in evidence, "showing the total number of tons of each variety of coal shipped and the amount of reparation due on such shipments," the reparation due being (1) the damages arising from undue discrimination, and (2) damage arising from the charging of unreasonable rates.

These amounts in the exhibits were arrived at by the parties applying the findings and conclusions of the Commission in its original report to the several shipments. These exhibits were examined by the defendant and "*admitted to be correct.*" It was not necessary to set forth these exhibits in the report, any more than it was necessary to give any other evidence *in extenso* upon which the Commission made its findings. These exhibits were pre-

sented as evidence, and their correctness was admitted; and from this evidence the Commission made its findings. These findings in the supplemental report are specific and complete in every particular. They show the number of tons shipped of each size, total amount of freight paid, the amount that should have been charged, and the total damages as to each cause of action. Here, then, we have facts found by the Commission which sustain every allegation of the plaintiff's complaint. Under the authorities it was, we respectfully submit, the duty of the court, *there being no defense interposed by the railroad company*, to charge the jury that upon these facts the plaintiff was entitled to recover the amount awarded by the Commission.

#### TRIAL BY JURY.

Referring to the position taken by the plaintiff that these reports and orders constituted a *prima facie* case, the learned judge said, in the last opinion:

It is also still more unjust in these cases, because if sustained it practically and substantially makes the award of the Commission not only *prima facie*, but *conclusive* evidence of the plaintiff's case.

\* \* \* \* \*

Can it be doubted that the parties, therefore, are entitled to a *real* trial by jury so conducted as to accord to them in full measure the enjoyment of their constitutional right? If so, how wide of the truth is the

contention that this right has been enjoyed by the defendant in the present suit?

\* \* \* \* \*

Though stated to be *prima facie*, it is really, according to that theory, *conclusive as to the injury of the plaintiff and the amount of his damage.*

\* \* \* \* \*

In view of this, it would seem almost an abuse of language to say that the "facts," of which the findings and order of the Commission are *prima facie* evidence, include the conclusions arrived at by the Commission as to the injury of the plaintiff and the amount of the damages sustained.

\* \* \* \* \*

The argument to the contrary is largely technical, and tends to make a mockery of the right of a jury trial and to defeat the just purposes of the act in that respect. (Record, 434, pp. 158, 159.)

The learned judge seems to overlook the fact that after the plaintiff had made out a *prima facie* case entitling him to a verdict of judgment if no defense was interposed, the railroad company had full opportunity to introduce evidence showing that the plaintiff had not been injured by the discriminatory charges or the unreasonable rates, or that he had not paid the charges or part of the same; that the claim, or any part of it, was barred by the statute of limitations—in fact, the whole field of meritorious defense was open to the railroad. It chose not to introduce any evidence upon the main issues.

The case, therefore, stood upon the *prima facie* case made out by the plaintiff, and it became the duty of the court to charge the jury what verdict it was their duty to render. It is strange reasoning to say that to hold that the findings of the Commission made out a *prima facie* case was equivalent to holding the Commission's findings *conclusive*. In all cases where certain documentary evidence is made *prima facie* evidence of the ultimate facts upon which a judgment may be entered the same result would follow. Take the case of a promissory note or a transcript of the judgment of another court: It is no deprivation of the *right* of trial by jury to say that upon such *prima facie* evidence, without any defense being interposed, it is within the province of the judge to charge the jury that it is their duty, upon such evidence, to find a verdict for the plaintiff. Such instances are very common in courts of justice. Verdicts are rendered under such instructions without leaving the box. It is in no sense a violation of the constitutional right of trial by jury for the legislative branch of the Government to determine what shall be *prima facie* evidence of the facts. This is not conclusive upon the defendant. It simply puts the defendant upon proof; and if he desires to have his defense, if he has any, passed upon by the jury, or, rather, if he desires to have the whole case passed upon by the jury, it is his duty to introduce his evidence and show what meritorious defense he has to the *prima facie* case.



Mr. Justice Lamar said:

As the statute makes its findings *prima facie* correct \* \* \* it will be more convenient to consider the case from the standpoint of the carriers who first insist that the order was void. (*I. C. C. v. Union Pac. R. R.*, *supra*, p. 546.)

It is not "trial by jury" but "*the right of trial by jury*" which the seventh amendment to the Federal Constitution declares "shall be preserved." (*Capital Traction Co. v. Hof*, 174 U. S., 1, 23.) It is not for the trial judge to insist upon a trial by jury when the defendant is before him. It is for the defendant to secure such a trial by offering evidence which tends to rebut some or all of the material facts established by the *prima facie* case.

It is now a settled rule in the courts of the United States that whenever, in the trial of a civil case, it is clear that the state of the evidence is such as not to warrant a verdict for a party, and that if such a verdict were rendered the other party would be entitled to a new trial, it is the right and duty of the judge to direct the jury to find according to the views of the court. This is not a violation of the right of trial by jury. (*Dowditch v. Boston*, 101 U. S., 16, 18; *Coughran v. Bigelow*, 164 U. S., 301, 307.)

Trial by jury is never had where a rule of the court, in actions *ex contractu*, requires in certain cases an affidavit of merits to be filed by the defendant, and it is not filed. The judgment is rendered

upon the sworn complaint of the plaintiff. (*Fidelity, etc., Co. v. United States*, 187 U. S., 315.)

Where action is brought for a sum certain, or which may be rendered certain by computation, judgment for damages may be entered by the court without a writ of inquiry. (*Renner v. Marshall*, 1 Wheaton, 215; *Aurora City v. West*, 7 Wall., 82, 104.)

But where the sum for which judgment should be rendered is uncertain, the rule in the Federal courts is that the damage shall, if either of the parties request it, be assessed by the jury. (*Aurora City v. West, supra*; *Armstrong v. Carson*, 2 Ball, 202.)

Where a jury is empaneled and a *prima facie* case is made out under the law applicable to the case, and the defendant fails to offer any proof in defense upon the merits of the case, and the court has jurisdiction of the subject matter and the parties, "the jury," to quote again the language of Mr. Justice Story, *supra*, "are bound to consider it in that light, unless they are invested with authority to disregard the rule of evidence by which the liberty and estate of every citizen are guarded and supported."

The "right of trial by jury," therefore, is not abridged by an act of Congress providing that certain findings shall constitute *prima facie* evidence of ultimate facts. Whether there shall, in such a case, be a trial by jury *in fact* depends upon the action of the defendant in offering or neglecting to

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offer any testimony by way of defense. It is still a trial by jury if, in such cases, the court instructs the jury that it is their duty to find a verdict for the plaintiff.

#### MEASURE OF DAMAGES.

There are two distinct causes of action in this case. The first arises under the second section of the act by reason of the giving of discriminatory rates; and the second arises under the first section of the act in charging unreasonable rates.

*Damages arising because of discrimination.*— There is no general measure of damages that can be applied. The rule is very clearly stated in the Coal cases that damages are to be measured by the injury which a party has sustained as the direct result of the giving of discriminatory rates to other shippers and refusing such rates to the complainant. This injury, of course, must be ascertained by a tribunal having jurisdiction, and must be arrived at by proof of the injury and the extent of it.

As already contended, the court and jury in this case must accept the ultimate findings of the Commission that the plaintiff was injured and the extent of his injury, there being no evidence submitted by the defendant company. It may, however, be contended that the report shows upon its face that the Commission applied a measure of damages not warranted in law. What the Commission did was to allow as damages the difference between the rates paid by the complainant and the

rates allowed to other contemporaneous shippers during the period named. It is conceded that this is not a measure of damage *to be applied in every case*. Every case must depend upon the circumstances of the case as was so clearly stated by Mr. Justice Lamar, speaking for this court in the *International Coal case (supra)*:

The measure of damages was the pecuniary loss inflicted on the plaintiff as the result of the rebate paid. Those damages might be the same as the rebate, or less than the rebate, or many times greater than the rebate; but unless they were proved, they could not be recovered. Whatever they were, they could be recovered, because §8 expressly declares that whenever a carrier did an act prohibited, or failed to do an act required, it should be "*liable to the person injured thereby for the full amount of the damages sustained in consequence of such violation \* \* \* together with reasonable attorney's fee.*"

It was the duty, therefore, of the Commission to inquire into the circumstances attending the discrimination in this case, and ascertain in what manner the complainant was affected by it and the extent of his injury. It "might be the same as the rebate." It might not be. The damages, in all cases, must be the natural and proximate consequences of the act complained of.

The peculiar circumstances outlined in the report show the reasons why the Commission con-

cluded that the damages were the differences between the rates paid by the complainant and the rates allowed to the Lehigh Valley Coal Co. For a long period of time the "adjusted rates" upon coal were fixed under what was known as the 60 per cent contract, herein described. All parties had adjusted their business to that arrangement and expected to receive the benefits of it. In November, 1900, the operators asked for a change in that contract, giving them more favorable terms. That negotiation went on for a considerable period of time before an agreement was reached, the operators continuing to regulate their business in reference to the old conditions with a possibility of some advantage from a new agreement. It was understood that the new agreement should date back to the period when negotiations began. An agreement was reached by which the contract was changed to a 65 per cent contract, thus reducing the adjusted rates 5 per cent. Pursuant to the understanding under which all parties had acted and transacted their business, the company allowed all the operators except the complainant the benefit of the reduced rate. *This benefit was refused to Meeker & Company.* In consideration of all these circumstances, *the fact that their business had been conducted with the expectation of receiving this benefit, and that the prices of coal in New York had been made based upon it,* the Commission found that the amount allowed other operators was, in

*this case*, a proper measure of the complainant's damage.

Whether this 60 per cent contract was lawful or not is a question we have nothing to do with in this case. This was not a suit upon the contract. It was a claim for damages by the only operator who had not received the benefit of the contract. This measure of damages put the operators upon an equality during the period named prior to August 1, 1901. It repairs the injury to the business of Meeker & Co. The damage actually sustained was that impairment of their profits occasioned by fixing the prices of coal in New York and meeting the competition of their competitors on the expectation that the agreement to make the final settlement retroactive to November 1, 1900, would be shared by Meeker & Co., *their business having been conducted upon the understanding that the settlement would be made retroactive*, and the company having carried out that understanding with their competitors. In the opinion of the Commission this was the real measure of damages under the peculiar circumstances of the case.

The Commission, as a tribunal charged with the settlement of these claims, must ascertain the damages under such rules as the Commission adopted. It can not be said that the measure of damages applied in this case is unlawful. It does not violate any rule of law. The court might, it is true, accept some other measure of damages if it had all

the facts before it. But without the facts the measure of damages apparently adopted by the Commission can not affect the *prima facie* value of the report and order as evidence. It is very different from a case where the report shows upon its face that a *rule of law* has been misinterpreted or not enforced. There is no rule of damages that can be applied in all such cases. Therefore it can not be said that, upon the face of the report, the court could draw the conclusion that the Commission erred in the measure of damages which it adopted. If the defendant desired to test this question it could have offered evidence showing the conditions and circumstances of the case and asked the court to apply a different rule of damage, which the court could have done if it had had the evidence before it. But without evidence upon which the court and jury could form an independent judgment as to the damage, the report of the Commission must be accepted as *prima facie* evidence of the amount of the damages sustained by the plaintiff.

*Damages occasioned by payment of unreasonable rates.*—Injury resulting from the payment of unreasonable rates or, as it was usually designated, overcharging, was recognized at common law. Where the party, in order to get his property, was compelled to pay an unreasonable rate, he could sue and recover damages. The service had been performed, the payment had been made, and the party making the payment could recover the amount of the overcharge. The measure of damages was the



difference between a *reasonable charge* and the amount actually paid.

This company \* \* \* is subject to the same control as private individuals under the same circumstances. It \* \* \* can charge only a reasonable sum for the damage. In the absence of legislative regulation upon the subject *the courts must decide for it, as they do for private persons when controversies arise, what is reasonable.* (*Chicago, etc., R. R. Co. v. Iowa*, 94 U. S., 155-161.)

At common law, the question whether the charge collected was extortionate or unreasonable was determined by the jury. If the jury found that the charge was extortionate, they then found what would have been the fair and reasonable charge. The difference between these constituted the damage which the injured party was entitled to recover. It is the only general measure of damages which can be applied. It is in fact simply an overcharge. If the payment had not been made, and the carrier brought suit to recover for the service, barring a stipulated agreement, he could only recover what the jury determined was a fair and reasonable charge. If the carrier had extorted a payment greater than was reasonable by refusing to deliver the goods unless payment was made, the party injured could make the payment under protest and sue and recover the difference or the amount of his injury.

The act to regulate commerce does not provide any different measure of damages for the violation of section 1, which makes it the duty of all common carriers to charge "rates that shall be just and reasonable," and declares "every unjust and unreasonable charge for such service prohibited and declared to be unlawful."

Carriers originate their rates and file schedules thereof under section 6. The law makes these rates lawful rates *until they are declared unreasonable by the Commission*. The result is that the carrier must collect and the shipper must pay the published rate. If the rate in a particular case is unjust and unreasonable, the carrier has violated the law, just as at common law the carrier violated the law when he made an extortionate charge. In either case the shipper has his remedy, which is to recover the difference between the unreasonable rate paid and what would have been a reasonable rate, for the services rendered.

But under the act to regulate commerce, the court and jury can not determine the question whether the rate charged and collected was unreasonable, nor can they determine what would have been a reasonable rate. These two questions of fact *must be determined by the Commission*. (*Texas, Etc., Ry. Co. v. Abilene Cotton Oil Co., supra*; *B. & O. R. R. v. Pitcairn Coal Co., supra*; *Robinson v. B. & O. R. R. Co., supra*; *Mitchell Coal Co. v. Penna. R. R. Co., supra*; *Penna. R. R. Co. v. International Coal Co., supra*.)

The general or fundamental measure of damages in all these cases is, however, the difference between the unreasonable rate paid by the plaintiff and the reasonable rate found by the Commission which ought to have been charged. This measure of damages had been applied by the Commission ever since the enactment authorizing them to grant reparation in such cases. It was the rule applied by the Commission in an order approved by the court in *Baer Bros. v. Denver & R. G. R. R. Co.* (233 U. S. 479).

The marked difference between suits to recover damages because of the charging of unreasonable rates and a suit brought to recover damages occasioned by the charging of discriminatory rates is that in the latter case there is no "measure of damages" that can be laid down applicable to all cases, other than to say "the compensation shall be equal to the injury." As we have already observed, the injury must be proved, and the court will apply to the case a measure that will fit the case; whereas in suits brought to recover damages for an overcharge or the payment of unreasonable rates, there is an established measure of damages which will be applied. We do not contend, of course, that a shipper would be entitled to recover the full measure of damages if he had only paid a part of the freight charge. Take, for instance, a case where the shipper has sold coal f. o. b. at point of origin, freight to be paid by the consignee. He could recover nothing, because he had not paid the unreasonable charge. This does not affect the measure of

damages to be applied where a party has been in fact injured by making payment of the charges. Suppose the shipper sold coal, the consignee to pay half the freight and the shipper paid half. The fundamental measure of damages which would have to be applied would be the difference between the reasonable rate and the unreasonable rate paid. Of this amount the shipper could only recover one-half, that being the extent of his injury. The amount, however, to be paid to the shipper could only be ascertained by first taking the difference between the reasonable rate and the unreasonable rate and giving such proportion of that amount as damages as his payment bore to the total amount of the charge. These conditions do not change the correctness of the general rule of damages which must be applied in all cases of this character.

The learned judge who wrote the opinion in the court below, we submit, confuses the issue by confounding "proof of injury" with "measure of damages." He declares that the *measure of damages* in both classes of cases—under section 1 and section 2—is *precisely the same*. Quoting the words of Mr. Justice Lamar, "do not support the proposition, that damages can be recovered without proof of what pecuniary loss had been suffered *as a result of the discrimination*." Judge Gray says:

No more in this case can the difference between what is found by the Commission to be the unreasonable tariff rate and that fixed

as a reasonable one *be made the measure of the damage that the plaintiff has suffered.* (Record, 434, pp. 148, 149.)

In the supplemental opinion, referring to the words in the statute "liable \* \* \* for the full amount of damages sustained," this rather obscure reasoning appears:

What those damages may be is a question of fact to be determined by the jury and not a question of law. \* \* \* This is the measure of damage established by the act itself, and must be conformed to in a case like the present. The language of the eighth section makes the measure of damage therein prescribed applicable to every violation of the act. Nor has the Supreme Court in any case decided otherwise. Its reasoning has to be the measure of damage established by the eighth section, is also applicable to every violation of the act—to one that depends for its legality upon a finding of the Commission as well as to one where such finding is unnecessary. The argument to the contrary is largely technical and tends to make a mockery of the right of a jury trial, and to defeat the just purposes of the act in that respect.

To declare by statutory enactment that a party may recover damages for injuries sustained is not a "measure of damages," as this phrase is used in legal procedure. Of course the party must prove his damage, and he can only recover to the extent of his injury; but a "rule of damages" is for the

guidance of the jury or tribunal determining the question, and that measure is stated by the court as a matter of law, applicable to the case. In cases of discrimination or rebating there is no such fixed rule of damage as in the cases where an unreasonable rate has been charged. To say, therefore, that the "*rule of damages*" is *precisely the same in both classes of cases*—for discrimination and for unreasonable rates—because a party can only recover, in either case, *the amount of his injury*, is confusing the issue. The question really is, Is there a general measure of damages to be applied in either case? To this we answer that there is a general rule to be applied in cases where the action is brought to recover damages on account of an unreasonable charge. If what the learned judge meant to say was that if, in cases of this class, a plaintiff *might not* be entitled to the full measure of damages arising by reason of the unreasonable charge, we admit that that is true. If the shipper paid part and the consignee part of the unreasonable charge, of course the shipper can not recover the whole, but only his proportional part of the total damages. But as stated above this does not change the ordinary rule by which the damages are to be ascertained.

In the case at bar no question was raised about the plaintiff not having paid the full amount of the charges. In fact the report shows that the defendant conceded that the plaintiff had paid the

full rates charged and that, under the ruling of the Commission as to what would have been a reasonable rate, he was entitled *prima facie* to the full amount of the difference as reparation. The general rule of damages, therefore, applies, and no other possible rule is, or can be suggested that would be appropriate to apply in such case.

#### STATUTE OF LIMITATIONS.

Section 16, after providing a two-year statute of limitations for all complaints for the recovery of damages before the Commission, contains this proviso:

provided that claims accrued prior to the passage of this act may be presented within one year.

There is no provision that this proviso was to apply simply to claims "accrued prior to the passage of" the act that were not more than two years old. It applies in terms clear and explicit to all claims which had accrued at the time the act went into effect. This view was adopted by the Commission and set forth in a conference ruling (Bulletin No. 5, rule 10), as follows:

Claims filed with the Commission since August 28, 1907, must have accrued within two years prior to the date when they are filed; otherwise they are barred by the statute. Claims filed on or before August 28, 1907, are not affected by the two-years' limitation.



This construction has been followed by the Commission in cases coming before it, and has been recognized by the Circuit Court of Appeals for the Sixth Circuit. (*L. & N. R. Co. v. Dickerson*, 191 Fed., 705; *A. J. Phillips Co. v. Grand Trunk Ry. Co.*, 195 Feb. 12.)

The correctness of the Commission's ruling seems to be very well covered by the phrase in the last opinion of the learned judge in the court below. Omitting "legislation regarding the two-years' limitation as to old claims," it would then read:

In order, however, to prevent (shippers having) accrued claims \* \* \* from being taken by surprise and put at a disadvantage, as compared with those \* \* \* whose claims having accrued after the passage of the act had full notice of the time within which they must be prosecuted, Congress gave a year's time within which claims accruing before the passage of the act might be presented to the Commission.

This is not an uncommon provision by the legislative branch of the Government. In providing short terms of limitation, parties whose actions have accrued prior to and without regard to any such limitation are given a short time within which to bring their actions. There is no greater reason why those whose claims had accrued within two years should be protected than there was that all claims which had accrued prior to the passage of the act should be given an equal opportunity to be

presented within the year prescribed. This seems so clearly the intent of Congress and the plain meaning of the words used in the act that further argument is hardly necessary. The mere statement of the proposition seems to carry with it a conviction that the construction adopted by the Commission, and enforced in cases since the passage of the act, is the true construction.

In a recent work on *The Law Relating to the Interstate Commerce Commission*, by John Horatio Nelson, Esq., of the District of Columbia bar, the meaning of the statute as regards limitations is clearly set forth (p. 97):

If the effect of the above ruling of the Commission is to give all claims at least two years, regardless of when they accrued, then said two-year limitation must be given a retroactive effect and made to apply to claims accrued before the act. All claims for damages arise prior to the passage of the act or subsequent thereto. The first clause requires all complaints to be filed within two years from the time the cause of action accrues, and this provision might have been construed to have a retroactive effect and barred all those existing claims which had not accrued within two next preceding the date of the passage of the act, had it not been for the enactment of the proviso. The proviso has a twofold effect: (*a*) To save all existing claims for one year; (*b*) to make it clear that the first clause was not

intended to act retrospectively and apply to existing claims, but was to operate prospectively on claims thereafter accruing. The proviso becomes a substitute for any retroactive effect that might be attributed to the first paragraph. To give the first clause a retroactive effect and allow accrued claims two years would conflict directly and irreconcilably with the proviso. The statute must be interpreted so that all parts of it may take effect and harmonize, if possible. If the subject matter of legislation has been covered by a direct enactment (as has been done by limiting accrued claims to one year), this supersedes any legislation of doubtful interpretation or indirect application to the same subject matter; that is to say, the two years' limitation can never be applied to accrued claims because the law expressly applies the one-year limitation to that class. All provisions of uncertain meaning must be subordinated to direct and specific enactments. Statutes are to be construed to have a prospective operation unless a contrary intention in the legislature is manifest and plain. (*Murdock v. Franklin Ins. Co.*, 33 W. Va., 407.)

\* \* \* \* \*

The limitation provided in the statute is therefore applicable to two classes of claims, viz, (a) accrued claims; (b) those thereafter accruing, leaving the meaning of the statute to be that all claims which had accrued prior to the passage of the act must be pre-

sented to the Commission within one year from the passage of the act, and that all claims accrued subsequent to the passage of the act shall be filed with the Commission within two years from the time the cause of action accrues.

#### CONCLUSION.

The foregoing discussion covers the issues in which the Commission is particularly interested. The other questions raised are ably discussed by counsel for the plaintiff.

We contend that the Commission is a tribunal created by law and endowed with a jurisdiction to hear and determine claims for damages resulting from the violation by carriers of *any* provision of the act to regulate commerce; that the purpose of the act is to facilitate the adjustment and payment of these damages by allowing the shippers to come before the Commission with their complaints; that where the carrier refuses to comply with the orders of the Commission, and insists upon a trial in court, the proceeding is to be expedited in every way and the burden of the controversy is upon the carrier; that in order to carry out this purpose, the findings of facts made by the Commission, upon which the award of the Commission is made, are to be *prima facie* evidence before the court; that where the findings cover all the ultimate facts essential to the entry of a judgment by the court upon the pleadings, the plaintiff makes out a complete *prima facie*

case by presenting the report and orders of the Commission; that it is the duty of the court in such cases, where no defense is interposed by the carrier, to instruct the jury to find a verdict for the plaintiff; and that upon such verdict a judgment is properly entered; that in this case the findings of facts by the Commission in its report and orders covered every ultimate and material fact necessary to be determined under the issues in these cases. No part of the claims being barred by the statute of limitations, the trial court properly instructed the jury and entered a judgment upon the *prima facie* case made by the plaintiff.

We therefore submit that the judgment of the Circuit Court of Appeals should be reversed, and that the judgment of the lower court should be affirmed.

Respectfully submitted.

JOS. W. FOLK,  
CHAS. W. NEEDHAM,  
*Counsel for the Interstate  
Commerce Commission.*



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# Supreme Court of the United States.

OCTOBER TERM, 1914.

Nos. 434 and 435.

HENRY E. MEEKER, surviving partner of the firm of  
Meeker & Co.,  
*Petitioner,*  
*vs.*

LEHIGH VALLEY RAILROAD COMPANY,  
*Respondent.*

HENRY E. MEEKER,  
*Petitioner,*  
*vs.*

LEHIGH VALLEY RAILROAD COMPANY,  
*Respondent.*

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## BRIEF FOR PETITIONER.

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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1914.

HENRY E. MEEKER, surviving partner  
of the firm of Meeker & Co.,  
Petitioner,

vs.

LEHIGH VALLEY RAILROAD COMPANY,  
Respondent.  
(No. 434).

Brief for Petitioner.

HENRY E. MEEKER,  
Petitioner,

vs.

LEHIGH VALLEY RAILROAD COMPANY.  
Respondent.  
(No. 435.)

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE THIRD CIRCUIT.

**Statement.**

*Certiorari* to review judgments of reversal directed by  
the Circuit Court of Appeals for the Third Circuit, reversing  
two judgments in favor of the petitioner for \$109,280.17

NOTE: The Record in No. 435 is in most respects identical with that in  
No. 434, and the references in this brief will be to the latter Record and to  
the top or print paging, unless otherwise indicated. For greater precision  
and convenience, the references are occasionally made to the marginal or  
original paging, which is indicated by prefixing a star to the number of  
the page.

and \$13,161.78, respectively, entered upon verdicts rendered in actions brought under Section 16 of the Act to Regulate Commerce, to recover damages upon orders of reparation made by the Interstate Commerce Commission.

The petitioner is the surviving member of the firm of Meeker & Co., dealers in anthracite coal in the City of New York, who obtained their coal in the anthracite region of Pennsylvania and shipped it to tidewater at Perth Amboy, New Jersey, over the Lehigh Valley Railroad.

On July 17, 1907, Meeker & Co. instituted a proceeding before the Interstate Commerce Commission (No. 1180), in which they complained that the Railroad Company had unlawfully discriminated against them in the rates charged between November 1, 1900, and August 1, 1901, and had thereafter, down to the commencement of the proceeding, charged them unreasonable and excessive rates for the transportation of coal; and they asked for an order to cease and desist and for reparation.

Issue was joined; and the matter proceeded to a hearing. A large amount of evidence was taken, the hearings having extended over a period of about four years (\*138).

In 1911, the Commission filed its report in favor of the complainants (16-48), in which it found that the rates charged complainants from November 1, 1900, to August 1, 1901, had been unjustly discriminatory, in an amount specified (\*36), and that the subsequent rates had been unreasonable, to the extent stated (\*72), and that reparation should be made in each case, and that further proceedings should be taken to determine the amount (\*73).

An order was entered, requiring the Company to cease and desist from charging the rates then in effect, which were held to be unreasonable (48).

After taking further evidence on the question of damages, the Commission filed a supplemental report, in May, 1912 (10-12), upon which an order was entered (13), finding that complainants were damaged and the amount of reparation to which they were entitled, both for the unjust discrimination between November 1, 1900, and August 1, 1901 (\$11,009.33 and interest), and for the unreasonable rates subsequently charged (\$58,236.45 and interest).

On April 13, 1910, while the first proceeding was still

undisposed of, Mr. Meeker instituted another proceeding (No. 3235 before the Commission), to recover the damages for alleged unreasonable rates charged subsequent to July 17, 1907 (\*37). The evidence taken in the first proceeding, which covered the period included in the second proceeding, was treated by both parties as applicable to the second proceeding; and a similar decision was rendered in the second proceeding. The Commission awarded the sum of \$10,813.60 for the damages sustained as the result of the unreasonable rates charged subsequent to April 13, 1908, (\*19), having declined to allow any damages for the period prior to two years before the commencement of the proceeding (April 13, 1908), on the ground (\*18) that the claim for such damages was barred by the two year statute of limitations passed in 1906, amending Section 16 of the Act (34 Stat. L. 590). An order of reparation was entered, accordingly (\*21).

The Railroad Company refused to pay the amounts awarded; and, in September, 1912, two actions were commenced against the Company, in the United States District Court for the Eastern District of Pennsylvania (the road of the Company running through that District), to enforce the orders of reparation and recover the damages sustained by reason of the wrongful acts of the Company.

In the petitions or complaints in these actions, all the facts entitling the plaintiff to recover damages were fully pleaded; and the reports and order of the Commission were annexed as exhibits (No. 434, 3-48; No. 435, 3-45).

Issue was joined by a plea containing a general denial, the defense of the statute of limitations, that the Commission had no jurisdiction to make the findings and orders of reparation sought to be enforced, and that there was no substantial evidence to sustain the findings and orders (No. 434 \*75; No. 435 \*70).

The actions came on for trial before Judge HOLLAND and a jury, in November, 1912. In each case, the plaintiff offered in evidence the original and supplemental reports of the Commission and order of reparation (No. 434, \*92, \*106-7; No. 435, \*75, 83); proof of the due service of the order having been conceded by the defendant (\*116-117). The plaintiff gave some formal testimony as to the shipments of the coal upon which the claims for damages were based and as to the fact



that the Railroad Company had not paid the amounts awarded by the Commission (No. 434, 50-80 ; No. 435, 46-57), and then rested.

No evidence on the main issues was offered by the defendant. The defendant merely submitted and explained certain itemized statements, which had formed part of the evidence before the Commission, showing the dates of the shipments, so as to enable the Court to apply the statute of limitations upon the different contentions urged by the defendant (80-86).

The Court requested that the reports and orders be read to the jury (\* 138) ; and, thereupon, counsel for the plaintiff read such portions thereof to the jury as he deemed material, without objection on the part of the defendant's counsel (\* 138).

The Court then charged the jury (No. 434, 89 ; No. 435, 59) ; and a verdict was rendered in favor of the plaintiff in each case ; in the first case, for \$109,280.17 (\* 210) and in the second case, for \$13,161.78 (No. 435 \* 118) ; and judgments were entered accordingly.

A motion for a new trial was denied in each case ; and, upon the plaintiff's application and upon submission of the record of the proceedings before the Commission and upon the oral statements of plaintiff's counsel in open court, without objection, the Court fixed and taxed as part of the costs the attorneys' fees for services performed in the proceedings before the Commission and in the actions ; the amounts being, respectively, in the first case, \$10,000 for services before the Commission and \$10,000 for services in the action, and, in the second case, \$2500 for services before the Commission and \$2500 for services in the action (No. 434 \* 212 ; No. 435 \* 120). Judgments were thereupon entered in favor of the plaintiff, which were reviewed, upon writ of error, by the Circuit Court of Appeals for the Third Circuit. The cases were argued in that Court in April, 1913 ; and, in the following August, a decision was rendered, reversing the judgment in each case and directing a new trial (No. 434, \*321 ; No. 435, \*223).

The main ground upon which the decision was originally based was that the findings of the Commission were not in the form required by the Act to justify their use as evidence upon the trial of an action under Section 16, and that the trial court

had not properly instructed the jury as to what particular findings the jury could consider. The Court below was also of the opinion that the findings and order of the Commission, even though in proper form and not controverted, did not make out a *prima facie* case upon which the plaintiff was entitled to judgment (133 ; 211 Fed. 785).

On the question of the statute of limitations, the Court held that, under the amendatory Act of 1906 (34 Stat. L., 590), permitting complaints to be made on *existing* claims within one year and barring all other claims at the end of two years, Meeker & Co. could not recover upon any existing claims arising prior to July 17, 1905 (two years before the complaint was made to the Commission). Upon this construction of the statute, which was contrary to the construction which had always been placed upon it by the Commission, about 75% of the total claims of Meeker & Co. were barred.

In October, 1913, upon the application of the defendant in error, the Circuit Court of Appeals granted a rehearing (132). The reargument took place in December, 1913. By a supplemental opinion handed down in February, 1914, the Court adhered to its previous decision ; but it did so on the ground that the findings and order of reparation could, under no circumstances, make out a *prima facie* case of liability for the amount specified in the order of reparation (151 ; 211 Fed., 802).

Thereafter, in April, 1914, this Court, upon the petition of the defendant in error in the Court below, granted an application, under Section 262 of the Judicial Code, for a writ of *certiorari* to review the judgments of the Circuit Court of Appeals (No. 434, 162 ; No. 435, 122).

The practice of the Commission in the present case, in making its reports and in awarding damages, has been that which has been uniformly observed by the Commission since its establishment, as the official Reports of its proceedings show. The effect of the decision of the Circuit Court of Appeals in the cases at bar is to reverse the settled practice of the Commission, to disregard the construction which has for many years been placed by the Commission upon the Act, and to throw a burden upon the shipper, in attempting to obtain redress for his grievances, greater than that which existed at common law.

### **Specification of Errors.**

The Court below erred in reversing the judgments and directing a new trial in each case, and it should have affirmed the judgments in all respects. The Court also erred in holding that the findings and orders of reparation in these cases were not in the form required by the Act to Regulate Commerce, that they were not properly received in evidence or presented to the jury by the trial court, and that they did not, under Section 16 of the Act to Regulate Commerce, make out a *prima facie* case upon which the plaintiff was entitled to judgment. The Court also erred in holding that any part of the claim of Meeker & Co. was barred by the statute of limitations and in the construction placed by it on the amendatory Act of 1906 (34 Stat. L., 590).

## P O I N T S .

### FIRST.

#### Procedure under the Act.

The main purpose of the Act to Regulate Commerce was to ensure the reasonable and equal treatment of shippers by the common carriers and to provide for a simple, effective and inexpensive method of obtaining redress for violations of the law.

Tex. & Pac. R. Co. v. Abilene Cotton Oil Co., 204 U. S., 426, 439 ;

New Haven R. R. v. Int. Com. Com., 200 U. S., 361, 391 ;

Robinson v. B. & O. R. R. Co., 222 U. S., 506, 509.

The resort to the courts was expensive and tedious, as they were not adapted to giving prompt and efficient relief and could not determine the facts in a uniform manner, under the varied conditions prevailing in different parts of the country. A body which would acquire intimate knowledge of the transportation conditions throughout the entire country and which would become familiar with all the problems growing out of the varying conditions, would evidently be the only tribunal in which practical relief could be obtained speedily and with the least possible expense and trouble, provided the procedure was simple and free from the technicalities which necessarily find their way into any regular system of legal procedure.

In the Report of the Committee on Interstate Commerce, made on January, 18, 1886, it was stated (p. 214) to be one of the purposes of the Act to "provide additional means of obtaining redress with much less difficulty and expense," and to make the report of the Commission "substantially establish the case of the complainant."

That it was the intention of Congress not to prescribe any rigid form of procedure is apparent throughout the Act.

I. Not one of the Commissioners is required to be a lawyer (Sec. 11). It was, therefore, evidently not intended to have

the strict rules of evidence applied in hearings before the Commission.

Int. Com. Com. v. Baird, 194 U. S., 25 ;  
Int. Com. Com. v. L. & N. R.R. Co., 227 U. S. 88,  
93.

II. All that a person aggrieved is required to do under the Act is to apply to the Commission by petition, "which shall briefly state the facts" (Sec. 13). It was not contemplated that a shipper would be obliged to employ counsel to draft the petition. Indeed, Section 17 expressly provides that any party may appear in person; and it has been held that the complaint may be made in a letter to the Commission.

Dickerson v. L. & N. R. R. Co., 15 I. C. C. Rep.,  
170, 172 ;  
L. & N. R. R. Co. v. Dickerson, 191 Fed., 705, 711  
(C. C. A., 6th Circ.).

Upon filing a petition, the carrier must then either satisfy the complaint or file an answer. In case an answer is filed, the Commission does not proceed to a formal trial of the issues. It is merely required "to *investigate* the matters complained of in such manner and by such means as it shall deem proper" (Sec. 13). Thus, the matter becomes one of inquiry by the Commission and not of the technical trial of the issues raised by the petition and answer, in the strict manner required by the rules of evidence in courts of law. This is made still more apparent by the further provisions of Section 13, requiring the Commission to investigate any complaints made by the Railroad Commission of any State; and such investigation is required to be made "in like manner and with the same authority and powers" as in the case of a complaint by a person directly aggrieved; and, under Section 13, the Commission may also institute an inquiry on its own motion and dispose of it in like manner as if it had been instituted by the filing of a petition by a shipper.

III. Having completed its investigation or inquiry, all that the Commission is required to do is to make a written report, stating its conclusions and decision; and if damages are awarded, the report must also "include" the findings of

fact. The language of the statute upon this point is as follows :

“ SECTION 14. That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order or requirement in the premises ; *and in case damages are awarded, such report shall include the findings of fact on which the award is made.*”

No particular form of report is prescribed ; and where damages are awarded, no *separate* findings of fact are required to be made. It is sufficient if the findings are included in the report, that is, if they can be found in the report.

IV. Findings of fact made by the Commission, where there is evidence to support them, will not be disturbed by the Courts ; and findings as to the reasonableness of rates, or as to any administrative act, are conclusive.

Tex. and Pac. Ry. v. Abilene Cotton Oil Co., 204 U. S., 426 ;

B. & O. R. R. Co. v. Pitcairn, 215 U. S., 481 ;

Int. Com. Com. v. D. L. & W. Ry. Co., 220 U. S., 235, 251 ;

Int. Com. Com. v. Un. Pac. R. R. Co., 222 U. S., 541, 547 ;

Int. Com. Com. v. L. & N. R. R. Co., 227 U. S., 88, 92, 100 ;

Intermountain Rate Cases, 234 U. S., 476, 490-1.

V. Where damages are awarded, the first sentence of Section 16 provides that “ the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.”

VI. Having obtained a report of the Commission in his favor and an order awarding him reparation, the shipper would be entitled to proceed forthwith to enforce payment of the amount awarded, were it not for the constitutional provision entitling the carrier to a trial by jury, where a claim for damages is sought to be enforced. That provision, however,

does not prevent the legislature from prescribing rules of evidence.

2 Wigmore on Evidence, Sec. 1354, sub. 3;  
 C. B. & Q. R. R. Co. v. Jones, 149 Ill., 361;  
 Bur. Ced. Rap. & R. R. Co. v. Dey, 82 Ia., 312;  
 Holmes v. Hunt, 122 Mass., 505, 516;  
 Kentucky & C. Bridge Co. v. L. & N. R. R. Co.,  
 37 Fed. 567, 614;  
 Western N. Y., etc., R. R. Co., v. Penn Refining  
 Co., 137 Fed. 343 (C. C. A., 3rd Circ.);  
 Int. Com. Com. v. Ala. Midland Ry., 168 U. S., 144,  
 175;  
 Int. Com. Com. v. Un. Pac. Ry., 222 U. S. 538,  
 546;

and this was recognized by the Court below in the present cases (\*245); and it was competent for Congress to provide that the findings of the Commission and the order directing the payment of damages should be *prima facie* evidence of the facts therein stated. The provisions of Section 16 on this point, are as follows:

"If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the circuit court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any state court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the Circuit Court of the United States shall proceed in all respects like other civil suits for damages, *except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated.*"

It is noticeable, that, in the case of an action under this Section, no greater formality in the pleading is required than in the case of an ordinary complaint by the shipper to the Commission, under Section 13.



## **SECOND.**

### **The procedure in the cases at bar.**

The procedure in the present cases was strictly in accordance with the provisions of the statute. Upon complaints duly made, to which answers were filed, the Commission made its investigation and filed written reports, which stated its conclusions and decisions and included the findings of fact on which it awarded damages; and it subsequently made orders directing the payment of the damages awarded on or before a day named. In actions duly brought to recover the damages thus awarded, the reports and orders were read in evidence; and no evidence was offered in rebuttal.

Obviously, unless some defect can be pointed out in this procedure, the petitioner was not only entitled to a verdict, but the Court should have given binding instructions in his favor. A verdict in favor of the defendant would have been set aside as contrary to the evidence.

## **THIRD.**

### **Findings of fact included in the Reports.**

I. Counsel for the Railroad Company successfully contended in the Court below that no proper findings of fact were made by the Commission, on which damages could be awarded.

The findings are required to be "included" in the report. The report must be in writing; and provision is made for the publication of the reports of the Commission for the information and use of the public (Sec. 14).

No different form of report is prescribed where the inquiry is made by the Commission, on its own motion, from that which is required where the investigation is made upon a complaint after an extended hearing. It is, therefore, entirely

clear that there was no intention to require any specific findings of fact or any findings in any particular form. The intention obviously was merely to require findings to be made, showing a violation of the Act from which a liability would arise under Section 8. If the findings do not show that the statute has been violated, there is, of course, no basis for an award of damages. Whether a liability results from the findings is a question of law for the court. If the facts appear anywhere in the report, showing a violation of the statute, that is sufficient. To require more than this would be to place form above substance and to make it possible to set aside a report and order of the Commission on purely technical grounds and thus render futile a prolonged and expensive hearing. This possibility was pointed out by Judge HOLLAND, with common-sense directness, in his refusal on the trial to exclude the report upon the technical grounds urged, when he said (No. 435, \*77):

"The reports, the conclusions and the findings of fact in the report are not what probably they might be for clearness; but it is not a proper thing that litigants should suffer by reason of any neglect of government officers in inartistically or negligently drawing reports; and if the Interstate Commerce Commission draws a report which substantially complies with the Act, it ought to be sustained, notwithstanding the fact that it shows a very negligent manner of treating the subject."

II. The reports in the present case are not inartistically or negligently drawn. They contain a concise statement of the facts and a clear and comprehensive discussion of the evidence, followed by the conclusions and recommendations of the Commission; and they also contain a direct and positive finding of the facts upon which the Commission based its award; and these findings are exactly where one would expect to find them, in an orderly discussion of the subject, namely, at the conclusion of the statement of facts and the discussion of the evidence.

In the first proceeding (No. 1180), the Commission found that the Railroad Company had carried coal to tidewater during the period from November 1, 1900, to August 1, 1901,

for shippers other than Meeker & Co., at a rate which was 35% of the tidewater price of coal, while Meeker & Co. were charged 40%. The Commission, after setting forth the facts, said (\*36):

"We are of the opinion, and so hold, that complainants have sustained the allegation of unjust discrimination under the second section of the Act. Reparation, with interest from August 1, 1901, will be awarded on this account."

As to the claim based upon the alleged unreasonable rates subsequent to August 1, 1901, the Commission, after a comprehensive review of the evidence, found that the rates charged Meeker & Co. were unreasonable; and it also found what the reasonable rates should have been. Its conclusion in this respect was as follows (\*72-3):

"After a careful study of defendant's exhibits relating to tonnage and cost of moving, as well as a painstaking analysis of its voluminous exhibits respecting its past and present financial condition, we are of opinion, *and so find*, that defendant's rates for the transportation of coal from the Wyoming region to Perth Amboy, of \$1.55 per gross ton on prepared sizes, \$1.40 on pea coal and \$1.20 on buckwheat coal, are unreasonable in so far as they exceed \$1.40 on prepared sizes, \$1.30 on pea coal and \$1.15 on buckwheat \* \* \*

We are further of opinion, that reparation should be awarded upon the basis of the rates herein found to be reasonable, upon the shipments of coal by complainants from the Wyoming region to Perth Amboy since August 1, 1901. The amount of reparation which should be awarded under our finding in this case cannot be ascertained from the exhibits now on file; and such further proceedings will be had as may be necessary to determine the amount of money due to complainants."

An order was accordingly made, requiring the Railroad Company to cease and desist from enforcing the rates held to be unreasonable and to establish and maintain for a period of two years the rates found to be reasonable (\*74).

III. In accordance with the decision of the Commission, further proceedings were then taken to ascertain the facts

upon which the amount of reparation should be determined. In May, 1912, a supplemental report was filed, in which the facts were clearly and distinctly found upon which the reparation was awarded. In this supplemental report, the Commission made the following finding (\*16-17):

"On the basis of our conclusions in the former report, and upon consideration of the evidence adduced at the hearing upon the question of reparation, *we now find*, that during the period from November 1, 1900, to August 1, 1901, complainant shipped from the Wyoming coal region of Pennsylvania to Perth Amboy, N. J., 55,257.75 tons of coal of prepared sizes, 16,689.76 tons of pea coal, 11,448.93 tons of buckwheat coal, and 4,926.77 tons of rice coal, and paid charges thereon, amounting to \$129,989.18, at the rates found to have been unjustly discriminatory; that complainant *has been damaged* to the extent of the difference between the amount which he did pay and \$118,979.85, the amount which he would have paid had he been given the benefit of the rates applied by defendant to similar shipments of the Lehigh Valley Coal Company; and that he is, therefore, entitled to an award of reparation in the sum of \$11,009.33, with interest thereon from August 1, 1901. *We find further*, that from August 1, 1901, to July 17, 1907, complainant shipped from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., 246,870.15 tons of coal of prepared sizes, 106,051.09 tons of pea coal and 87,250 tons of buckwheat coal, and paid charges thereon amounting to \$685,375.27, at the rates found to have been unreasonable; that complainant *has been damaged* to the extent of the difference between the amount which he did pay and \$626,945.62, the amount which he would have paid at the rates found reasonable, less \$193.20, deducted by stipulation of all parties on account of certain claims already paid; and that he is, therefore, entitled to an additional award of reparation in the sum of \$58,236.45, with interest, amounting to \$27,750.65, on the individual charges comprising said sum, from the dates of payment thereof to September 1, 1911, together with interest on said sum of 58,236.45 from September 1, 1911."

IV. With reference to the claim made in the second proceeding (No. 3235), for reparation for unreasonable rates

charged subsequent to the filing of the petition in the first proceeding (No. 1180), the Commission said (\*17-19) :

" With the exception of the reparation features, the issues involved in No. 3235 have been passed upon by the Commission in No. 1180. The latter case covered the period from November 1, 1900, to July 17, 1907, while the instant case is designed to secure reparation upon shipments which moved between July 17, 1907, and April 13, 1910. The petition in the present case, therefore, resolves itself into a prayer for reparation on shipments moving subsequent to the period covered by the original report, on basis of the conclusions announced in that report.

In No. 1180, the complainant attacked the reasonableness of rates charged by defendant for the transportation of various sizes of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., and asked reparation. On June 8, 1911, the Commission rendered its decision in that case. The petition in the present case was filed on April 13, 1910, or about a year prior to our decision in No. 1180. As before stated, it attacks the same rates that were found unreasonable in No. 1180, and asks reparation on shipments moving from July 17, 1907 to April 13, 1910.

\* \* \*

On basis of our decision in No. 1180, and upon consideration of the evidence submitted at the hearing of the present case regarding the amount of reparation due complainant, *we now find* that the rates exacted by defendant for the transportation of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., during the period from April 13, 1908, to April 13, 1910, were unreasonable to the extent that they exceeded rates of \$1.40 per gross ton on prepared sizes, \$1.30 on pea and \$1.15 on buckwheat; that complainant shipped from said point of origin to said destination during the period above set forth, 46,772.02 tons of coal of prepared sizes, 26,972.06 tons of pea coal and 22,004.09 tons of buckwheat coal; that complainant paid charges thereon, amounting to \$136,663.41, at the rates herein found to have been unreasonable, and *was damaged* to the extent of the difference between the amount which he did pay and \$125,849.81, the amount which he would have paid at the rates above found reasonable; and that he is, therefore, entitled to an award of reparation in the sum of \$10,813.60, with interest amounting to \$1,526.53 upon the individual

charges comprising said sum, from the dates of payment thereof to September 1, 1911, together with interest on said sum of \$10,813.60 from the 1st day of September, 1911."

V. Orders of reparation in each case were thereupon entered (No. 434, p. 14; No. 435, pp. 11-12), directing the amount to be paid by the Railroad Company.

In the supplemental report upon which these orders were based, the correctness of the amounts found to be due by the orders of reparation is stated by the Commission to have been "conceded of record by defendant" (\*19).

VI. In view of the explicit finding of the facts upon which the awards were based, how can it possibly be contended that the reports did not "include" the necessary findings? It might just as well be asserted that the reports did not state the conclusions reached by the Commission, or that they did not contain a discussion of the facts. The view taken by the Court below, that the reports in the present case did not include the findings of fact upon which the awards were made is one that is flatly and unmistakably contradicted by the record; and, indeed, it is contradicted by the Court itself which recognized, in its original opinion, that there had been findings of fact by the Commission to the effect that the rates charged between November 1, 1900, and August 1, 1901, had been unjustly discriminatory and that the subsequent rates had been unreasonable. On these points, the Court there said (\*276):

"By this report, the Interstate Commerce Commission held that the charges by the defendant to the plaintiff between November 1, 1900, and August 1, 1901, were discriminatory and, therefore, unlawful; and also that the charges of the defendant Company between August 1, 1901, and July 1, 1907, were unreasonable;

and the Court then states what charges the Commission had found to be reasonable.

## FOURTH.

### **Practice established by Commission controlling.**

I. The Commission is expressly required, by Section 12, to enforce the provisions of the Act. By Section 17, the procedure for this purpose is left entirely to the discretion of the Commission; the language of so much of the Section as is pertinent being as follows:

"That the Commission may conduct its proceedings in such manner as will best conduce to the proper despatch of business and to the ends of justice. \* \* \* Said Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it."

II. Even if absolute discretion as to the procedure had not been expressly conferred upon the Commission, its construction of the Act would be entitled to the greatest consideration.

Cohens v. Virginia, 6 Wheat., 264;

and when it has long been continued, the courts will recognize it as conclusive.

United States v. Hill, 120 U. S., 169, 180;

Robertson v. Downing, 127 U. S. 607, 613;

United States v. Alabama, etc. R. Co. 142 U. S. 615, 621;

New Haven Railroad v. Int. Com. Com., 200 U. S. 361, 401-2;

Logan v. Davis, 233 U. S., 613, 627.

The published Reports of the Commission show that the practice pursued by the Commission in the present case, in making findings, is the same as that which has always been pursued since the Act took effect.

III. If the Courts were to interfere with the findings and order of the Commission on the ground of informality, the



main object of the Act, which was to ensure the fair and uniform treatment of all shippers, might be defeated and the conclusions and recommendations of the Commission be disregarded or modified.

## FIFTH.

**Orders of reparation, supported by findings, establish the damages sustained in an action under Section 16, if not controverted.**

I. The orders directing the reparation to be made by the Railroad Company made out a *prima facie* case of the damages sustained by the plaintiff, upon the trial of the actions under Section 16. The Company was at liberty to show that there was no evidence before the Commission of any damage sustained by Meeker & Co.; or it might have produced affirmative evidence tending to show that Meeker & Co. sustained no damages or that the amount of the damages awarded by the Commission was excessive. But it did none of these things; and it cannot now be heard to question the correctness of the awards made. In the absence of rebutting evidence, the order making an award has precisely the same force and effect as the findings on the question of reasonableness and discrimination.

Mitchell Coal Co. v. Pennsylvania RR. Co. 230 U.  
S. 247, 258.

II. Not only did the Railroad Company not introduce any affirmative evidence in the present cases to controvert the findings of the Commission, but it did not even put in evidence the record of the proceedings before the Commission. It was, therefore, impossible for the Court below to say that the findings were not supported by the evidence.

III. Section 12 of the Act requires the Commission to "keep itself informed as to the manner and method" in which

the business of the common carriers is conducted; and it is empowered by that Section and by Section 20, "to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created."

The Commission is, therefore, in a better position to give proper weight and effect to the evidence presented on the question of damages than any other tribunal; and every presumption should be indulged in to support its award, which should be sustained, unless it is shown that some principle of law has been violated in making the award.

IV. That no principle of law was violated in assessing the damages is apparent from the statement contained in the supplemental report of the Commission, made after further evidence on the question of damages had been given, that "the accuracy of the figures in said exhibits respecting the shipments made, freight charges paid and reparation due, is conceded of record by defendant" (\* 19). In view of this concession, the Railroad Company is in no position to question the amount of damages, if the Commission had the power to award any damages whatever.

## SIXTH.

### **No error in the award of reparation based upon the unreasonable rates.**

The total damages awarded in the two proceedings, exclusive of interest, was \$80,059.38 (14-15). Of this total, only \$11,009.33 was awarded on the ground of unlawful discrimination (15), thus leaving \$69,050.05, or about 87% of the total amount, representing the damages based upon the excessive or unreasonable charges.

The Commission expressly found what rates should have been charged for the different sizes of coal and what rates were actually charged (\*72). It also found the number of

tons of coal of the different sizes that had been shipped and that the damages sustained represented the difference between the rates actually charged and the rates that should have been charged (\*17). These findings were amply sufficient to justify the awards made on this ground.

I. In the absence of any other evidence, it was entirely proper for the Commission to base its award upon the difference between the excessive charges and the charge which it found to be reasonable. That principle has been uniformly followed by the Commission from its earliest days, in making its awards in such cases.

Perry v. Florida, etc. Ry. Co., 3 I. C. C. Rep., 740 ;  
Burgess v. Transcontinental Tr. Bur., 13 I. C. C. Rep., 668 ;

Memphis Freight Bureau v. Kansas City So. Ry. Co., 17 I. C. C. Rep., 90 ;

Arkansas Fuel Co. v. C. M. & St. P. Ry. Co., 16 I. C. C., 95, 98 ;

Allen v. C. M. & St. P. Ry. Co., 16 I. C. C. Rep., 293 ;

Cohen v. Southern Ry. Co., 16 I. C. C. Rep., 177 ;  
American Crestos Works, Ltd., v. Ill. Cent. R. Co., 18 I. C. C. Rep., 212 ;

Sondheimer v. Ill. Cent. R. Co., 20 I. C. C. Rep., 606, 611 ;

Humboldt Refining Co. v. M. K. & T. Ry. Co., 22 I. C. C. Rep., 363, 365 ;

Riverside Mills v. St. L. & S. F. R. Co., 24 I. C. C. Rep., 264, 267, 271 ;

Betcher Lumber Co. v. C. M. & St. P. Ry. Co., 26 I. C. C. Rep., 335, 340 ;

J. E. Bryant Co. v. F. W. & D. C. Ry. Co., 28 I. C. C. Rep., 594, 598.

In Allen v. C. M. & St. P. Ry. Co. (*supra*), the Commission said (p. 295) :

“ The Commission has repeatedly held, that where it finds the rate exacted to have been unreasonable, it may award reparation by the difference between that rate and that which is reasonable, notwithstanding the former was the rate duly established by the carrier for the time being. We find that the rates charged were unreasonable and should not have exceeded the through rate established by the defendant and still in effect.

Reparation will, therefore, be ordered in the sum of \$190.74, which is the difference between the charges assessed and paid and those subsequently established."

The reparation awarded in the Allen and Arkansas Fuel cases was referred to with approval by this Court, in the Mitchell Coal Case, where the Court, after citing those cases, said (230 U. S., 247, 260) :

"The Commission, after the abandonment of a rate, has repeatedly received and heard complaints, and upon finding that it had been unreasonable, has granted reparation *accordingly*."

What the Court meant by the word "*accordingly*" was the overcharge, as appears from what it said on the previous page (p. 259) :

"Under the statute, the carrier has the primary right to fix rates, and so long as they are acquiesced in by the Commission, the carrier and shippers are alike bound to treat them as lawful. After the rate has been abandoned, the carrier is still obliged to treat it as having been lawful and cannot *refund* what had been collected under it *until* the Commission determines that what was apparently reasonable had in fact been unreasonable."

The Court here clearly had in mind the refunding or restitution of the overcharge ; and it employs the word "reparation," in this and other instances (204 U. S., 438, 441, 443), as the Commission has always done, in the sense of the restitution or refund of the amount unlawfully exacted.

After making the statement contained in the language just quoted, the Court goes on to show that there is the same reason for having the Commission determine the reasonableness of rates for the past as there is for the present or the future, namely, to ensure uniformity in awarding reparation ; and, after further discussion of the necessity of having the Commission determine the question of reasonableness in all its phases, the Court said (p. 264) :

"What is or was a proper allowance is not a matter of law until after it has been fixed by the rate-regu-

lating body. The Courts can then apply that law, and, measuring what has been charged by what the Commission declares should have been charged, can award damages to the extent of the injuries occasioned by the payment of the allowance found to have been unreasonable and unlawful."

The same principle was distinctly recognized by this Court in the Abilene Cotton Oil case (204 U. S., 426), where the Court said (p. 436) :

" It is also beyond controversy, that where a carrier accepted goods without payment of the cost of carriage or an agreement as to the price to be paid, and made an unreasonable exaction as a condition of the delivery of the goods, an action could be maintained *to recover the excess over a reasonable charge*. And it may further be conceded that it is now settled, that even where, on the receipt of goods by a carrier, an exorbitant charge is stated and the same is coercively exacted, either in advance or at the completion of the service, *an action may be maintained to recover the overcharge*."

The same principle was also recognized in a later decision of this Court.

Southern Ry. Co. v. Tift, 206 U. S., 428, 440.

In that case, the Railway Company filed advance rates on lumber, and a suit was brought to enjoin it from putting the rates into effect. The Court declined to grant the injunction ; and the advanced rates became effective and were paid by complainant. The Court held the bill so as to enable the plaintiffs to apply to the Interstate Commerce Commission to have the advanced rates declared unreasonable. An order was made by the Commission, declaring the old rates reasonable and the advanced rates unreasonable ; and the Circuit Court then referred the case to a Master, to ascertain " the sum total of the increase in rates paid by each of the complainants and other members of the Georgia Sawmill Association to either or all of the defendant companies since the rate went into effect, to the end of the litigation." Commenting upon the practice, this Court, at the close of its opinion, said (p. 440) :

"The objection that the reference is too broad is not of substance. What the court may award upon the

coming in of the report of the Master, we can not know. *Presumably, it will make the reparation adequate for the injury, and award only the difference on the old rate and to those who are parties to the cause.*"

II. This method of fixing the liability, by requiring the return of the overcharge, is based upon natural justice. By an unlawful act, the carrier has taken advantage of its position and compelled the shipper to pay a sum in excess of what it had any right to exact. This sum the carrier is, therefore, under a moral and legal obligation to return; and the return of the overcharge will presumably repair the wrong so far as the shipper is concerned. On the other hand, it would be most unjust to permit the carrier to retain what it had wrongfully extorted and compel the shipper to show precisely how and in what respect and to what extent he had been injured by the carrier's misappropriation of the shipper's property.

III. Even if there had been a different rule at common law, the only principle that can properly be applied under the Act to Regulate Commerce is that the liability should be represented by the amount of the overcharge. Any other rule would bring about diversity instead of uniformity of treatment of shippers by the carriers. If the Commission was not permitted to assess the damages in the first instance, for the protection of the carriers and for the guidance of the courts and juries, the amounts awarded would vary in every jurisdiction and in every action. This was expressly commented on by this Court, in the Abilene Cotton Oil case, where it was said, after referring to the power of the Commission to prescribe rates for the future (204 U. S., 426, 446) :

"And like reasoning would be applicable to the granting of reparation to an individual after the establishment of a new schedule, because of a wrong endured during the period when the unreasonable schedule was enforced by the carrier and before its change and the establishment of a new one. In other words, the difference between the two is that which, on the one hand, would arise from destroying the uniformity of

rates which it was the object of the statute to secure, and, on the other, from enforcing that equality which the statute commands."

The same conclusion was pointed out in the Mitchell Coal case (230 U. S., 247, 254).

## SEVENTH.

### **No error in the award of reparation based upon the discrimination.**

I. In the Court below, counsel for the Railroad Company contended that, in the case of discrimination, the damages can never be the difference between the rate paid and the rate given to the favored shipper, that is, the amount of the rebate ; and the decision of this Court in the International Coal Company case (Pennsylvania R. R. Co. v. International Coal Company, 230 U. S., 184) was relied upon as an authority for the proposition.

That case held nothing of the kind. An action based on unlawful discrimination had been commenced in the United States Circuit Court, *without previous application to the Commission*. The plaintiff assumed that by merely alleging and proving the fact of discrimination, he would be entitled, as a matter of law, to damages in the amount of the rebate. The complaint, as this Court observed (p. 198), contained "neither allegation nor proof" of any actual damages, although, as the Court also said (p. 204): "It is elementary that, in a suit at law, both the fact and the amount of the damages must be proved."

The Court did not hold that the damages might not have been the same as the rebate. On the contrary, it expressly said (p. 203), that "Those damages might be the same as the rebate ;" and it quoted (p. 207) with approval from a decision of the Supreme Court of Pennsylvania (Hoover v. Pennsylvania R. R. Co., 156 Pa. St. 220, 244) to the same effect.



II. Inasmuch as it was permissible for the Commission to find as damages the amount of the rebate, its finding was certainly *prima facie* evidence of the fact under Section 16; and this finding was not challenged by the Railroad Company, either by showing what the evidence before the Commission was or by proving affirmatively that the plaintiff had not sustained any damages.

III. The finding of the Commission, that the damages were equal to the rebate allowed to the Lehigh Valley Coal Company, cannot be questioned by counsel for the Railroad Company, because they did not produce the evidence upon which the Commission relied. But the evidence referred to by the Commission in its original report fully sustains the finding of the damages.

The entire capital stock of the Lehigh Valley Coal Company was owned by the Railroad Company (\*28, 36); and the Commission said (\*62), that "the record shows that the only line of demarcation between the Lehigh Valley Railroad Company and the Lehigh Valley Coal Company is one of bookkeeping."

The Commission found that the Coal Company monopolized the market reached by it; the amount shipped by it gradually increasing until 1908, when the Coal Company controlled 95% of the anthracite tonnage over the lines of the Railroad Company to Perth Amboy (\*62); and, necessarily, the price that the Lehigh Valley Coal Company received for this coal, at tidewater, fixed the market price of coal there to all other shippers, including Meeker & Co.

From November 1, 1900, to August 1, 1901, the price paid at the mines for coal was 60% of the tidewater price, thus making the rates charged to shippers to Perth Amboy 40% of the tidewater price, as the tariff rate then in force was purely nominal; but, during that period, a change in the purchase price, or, so far as the shippers were concerned, in the rate that would be more favorable to shippers, was in contemplation, and it was understood that when the change was made, it would take effect retroactively as of November 1, 1900, and that the excess paid by the shippers would be returned to them. On August 1, 1901 (\*31), the arrangement was carried into effect, accordingly, and the rate fixed at 35% of the tide-

water price from November 1, 1900, to August 1, 1901; and the Railroad Company returned to all shippers, except Meeker & Co., the 5% difference (21); thus clearly recognizing that the amount of the rebate correctly represented the damages. This conclusion inevitably followed from the facts; because, the coal of the Lehigh Valley Coal Company and that of Meeker & Co. had been sold at the same price. When, therefore, the Coal Company received the rebate, the Railroad Company, which owned it, was the actual beneficiary and was wrongfully enriching itself at the expense of all other shippers not similarly treated. The result was that the Railroad Company prevented Meeker & Co. from receiving the same price for their coal that its own Coal Company received; and Meeker & Co. were damaged to that extent.

IV. While the Commission made its award for the period from November 1, 1900, to August 1, 1901, on the theory of discrimination, the facts found show that the award would have been completely justified on the basis of an unreasonable charge. The rates were charged, with the understanding that they were to be adjusted, that is, placed upon a more reasonable basis and that the shippers were to have the benefit of such adjustment (\*31). Therefore, when the Railroad Company subsequently reduced the rate to every one except Meeker & Co., it made the reduced rate the lawful and reasonable rate; and it, consequently, became liable to make reparation or restitution for the overcharge which it had collected.

V. This Court has expressly decided that the proper measure of damages, in the case of discrimination, is the amount of the rebate allowed to the favored shipper.

Union Pacific Ry. Co. v. Goodridge, 149 U. S., 680, 697.

That was an action at law, to recover treble damages, under a statute of Colorado, for an alleged unjust discrimination in freights upon coal. The statute, as the Court observed (p. 687), was "of the same nature as the Interstate Commerce Act"; and it provided (p. 681) that any railroad corporation that violated the Act should be liable for "three

times the actual damages sustained." The complaint demanded as damages three times the amount of the rebate allowed to a single favored shipper (the Marshall Coal Co.); and, after a trial, a verdict was rendered for this amount. One of the grounds of error assigned was that there was no sufficient evidence to sustain the amount of damages. As to this point, the Court said, in an opinion written by Mr. Justice BROWN (p. 697):

"The seventh and last assignment of error was to the action of the Court in refusing to grant a new trial, and in entering a judgment on the verdict, because there was no sufficient evidence to support the verdict, and especially to sustain it as to the amount of damages. Plaintiff's evidence had shown that the Marshall Company have been receiving a rebate on all coal transported by it to Denver, which was not allowed to its competitors in business, and the damages sustained by the plaintiffs were measured by the amount of such rebate, which should have been allowed to them. The question whether they lost profits upon the sale of their coal by reason of the non-allowance of such rebates was too remote to be made an element of their damages. They were entitled to the same terms which the Marshall Company would have received, and damaged to the exact extent to which the Marshall Company was given a preference."

VI. The same conclusion was reached by the Circuit Court for the Northern District of Ohio.

*Hays v. Pennsylvania Co.*, 12 Fed., 309.

The Supreme Court in Missouri reached a similar conclusion, under the provisions of a statute which made it unlawful for a railroad company to charge more for a short than for a long haul.

*Seawell v. C. F. S. & M. R. R. Co.*, 119 Mo., 222.

*McGrew v. Mo. Pac. Ry.*, 230 Mo., 496.

In the former case, the Court said (p. 245):

"Why should not his damages be measured by the exact extent to which shippers from the latter point were given a preference? We cannot see any other practical standard by which his damages could be measured or that this instruction was erroneous."

In the McGrew case, the Court said (p. 547) :

“ The measure of damages for doing the unlawful thing, in the absence of any statute on the subject, is the amount of the excess charged for the shorter distance over that charged for the longer distance.”

Where a telegraph company charges one person a higher rate than it charges another, under similar conditions, the difference between the charges is the measure of damages which the one who is discriminated against is entitled to recover.

Western Un. Tel. Co. v. Call Pub. Co., 44 Neb., 326, 346.

At common law, in an action by a shipper against a carrier to recover damages for unreasonable or discriminatory charges, the measure of the damages was the difference between the excessive charge and the reasonable charge, or the amount of the rebate allowed to the favored shipper.

Cook v. Chicago Ry. Co. 81 Ia., 551.

## **EIGHTH.**

### **The three Opinions of the Court below.**

Two opinions were written in the present case by the Circuit Court of Appeals, one after the original argument, and a supplemental opinion after a rehearing (113, 151 ; 211 Fed., 785, 802).

The reasoning and conclusions of the Court in these opinions followed and elaborated the conclusions previously reached by the Court, upon substantially the same facts, in the case of the Lehigh Valley Railroad Company v. Clark (207 Fed. 717).

A better comprehension of the two opinions in the cases at bar will, therefore, be obtained by first considering the opinion in the Clark case.

## NINTH.

### **The Opinion in Lehigh Valley R. Co. v. Clark.**

The question in the Clark case (207 Fed., 717) was solely one of unreasonable rates. There was no question of discrimination. The shippers complained to the Commission that the tariff rate on pyrites cinder was excessive. After a hearing, the Commission found that the rate charged was unreasonable; and it fixed a reasonable rate for the future, which the railroad companies adopted; but the Commission at that time declined to award any reparation.

Several months later, after the railroad companies had put the new rate into effect, the shippers applied for a rehearing on the question of reparation; which was granted. After the hearing, the Commission "*made a finding* and ordered the defendant Companies to make reparation to the petitioners" (p. 719), in an amount specified. The findings made were that the rate collected "was unjust and unreasonable to the extent that it exceeded the subsequently established rate of \$1.45 per gross ton", and that the plaintiffs were entitled to reparation in a sum representing the difference between the excessive rate and the rate found to be reasonable, computed on the amount of the shipments (pp. 726, 729).

The Railroad Company failed to comply with the order of reparation; and an action was commenced under Section 16 to recover, as damages, the amount awarded. Upon the trial, the only evidence introduced was the two reports and orders of the Commission and proof that the awards had not been paid (p. 725).

The jury rendered a verdict in favor of the plaintiffs, for the amount that had been awarded by the Commission. The judgment entered upon this verdict was reversed by the Circuit Court of Appeals, upon the following grounds (p. 732):

1. That there were no sufficient findings of fact in the reports, as required by the statute.

2. That it was doubtful whether the findings contained in the original report could be considered in connection with the second report and the order of

reparation (p. 727), but if they could be considered, the findings were not sufficient to support the plaintiff's claim or make out a *prima facie* case of damage.

The Court thus held, that where, after a hearing, the Commission has found that an unreasonable rate has been charged and collected and has also found what would have been a reasonable rate, and the amount of the shipments, these findings are not sufficient to support an order directing an award to the extent of the difference and do not make out a *prima facie* case of liability for the damages awarded.

I. The extremely critical attitude of the Court towards the question under consideration is seen in its reluctance to concede that the findings contained in the original report of the Commission could be considered subsequently, in making the award of damages (p. 727).

It would add very much to the labors of the Commission and to the expense and time involved in hearing complaints, if the findings made in one stage of a proceeding could not be relied upon in a later stage of the same proceeding, between the same parties, in ascertaining the damages to be awarded.

A very different view of the subject is entertained by this Court. Not only is it proper for the Commission to consider the findings previously made by it in the same proceeding where all the parties before it were heard, but it may take notice of results reached by it in other cases, where other parties were before it, when its doing so is made to appear in the record and the facts thus noticed are specified.

United States v. B. & O. Ry., 226 U. S., 14, 20.

II. The critical disposition of the Court below is also evidenced in its unwillingness to concede that the Commission had made any findings of fact in the Clark case; and it refers slightly to the findings, and characterizes them as "statements" (p. 732) and as "supposed findings" (p. 728).

III. The point of view of the Court is further seen in its disposition to criticise the plaintiffs for having presumed to rely upon the findings awarded by the Commission as making out a *prima facie* case, instead of proving the facts in the manner required in an ordinary action at law.

On this subject, the Court comments as follows (p. 732) :

" The plaintiffs were not bound to rely upon *prima facie* evidence. The whole field of inquiry was open to them \* \* \* the production of such testimony as could be found bearing upon the issue."

In other words, the plaintiffs should not have availed themselves of their statutory rights, but should have tried out the entire case *de novo*.

IV. What the Commission actually found in its original report in the Clark case was (p. 726), that the rate on iron ore was \$1.45 per ton and that the rate on the cheaper commodity in question (pyrites cinder), which had been \$2 per ton, " should not exceed the rate on iron ore."

It made an order, accordingly, which was complied with by the carriers. Thereupon, after a rehearing on the question of reparation, the Commission made this finding, or " statement " as the Court preferred to call it (p. 726) :

" We now find, that the rate of \$2 per gross ton assessed and collected by the defendants on the shipments giving rise to complaint, was unjust and unreasonable to the extent that it exceeded the subsequently established rate of \$1.45 per gross ton. Complainant is entitled to reparation on all shipments moving within the period of the statute of limitations ; "

and then followed specific awards against the different Companies, based on the tonnage (pp. 726, 729).

What more was required to sustain an award of damages than the findings that the rate was unreasonable, the reasonable rate, and the amount of the shipments ? These facts establish a violation of the statute and a consequent liability under Section 8 ; and the shipments furnish the basis for the amount of damages awarded.

V. The fundamental error of the Circuit Court of Appeals, in the Clark case, was in holding that, in an action under Section 16, the damages must be proved and established in the same manner as if the action had been brought in the District Court in the first instance, without previously applying to the Commission. This is made evident from the fact that the



Court cited the International Coal Company case (230 U. S., 180) as a controlling precedent, decisive of the questions raised in the Clark case. Thus, it said of the decision in that case (p. 730) :

“ By it, the pivotal question involved in this case has, we think, been authoritatively and finally disposed of ” ;

and, again, on the same page, referring to the same decision :

“ The question here raised is in principle *precisely* that raised in the present case.”

As heretofore stated (*ante*, p. 24), the International Coal case was an action at law for damages resulting from unjust discrimination, *without a previous application to the Commission*. This Court held, what it stated to be elementary, that, in an ordinary action at law for damages, the fact that damages were sustained must be both pleaded and proved, and that neither had been done in that case. In the Clark case, the facts were duly pleaded, and the proof, which was entirely lacking in the International Coal case, was supplied in the findings of the Commission. There was, therefore, no question of either pleading or proof. The “ pivotal ” question in the Clark case was whether the finding of the Commission constituted *prima facie* evidence under Section 16 ; in other words, the question was one of the construction of Sections 14 and 16 ; but no such question was involved in the International Coal case, which had been commenced without previous application to the Commission and in which no evidence of any kind as to the damages was given. In spite of this obvious distinction between the two cases, the Circuit Court of Appeals said (p. 730) that there was “ no distinction in principle ” between them.

VI. In holding that the decision of this Court in the International Coal case was controlling, the Circuit Court of Appeals showed such an utter misconception of the real question involved, that it is, perhaps, superfluous to call attention to other misconceptions equally misleading. It may be worth while, however, to refer to some of these, as they appear in exaggerated form in the two opinions in the cases at bar.

1. The findings of fact were not in the form required by the statute (pp. 727, 732). This view was emphatically expressed and elaborated by the Court in the two opinions in the cases at bar, which will be referred to subsequently (*post*, pp. 39-40).

2. The Court apparently entertained the mistaken view that the findings required by the statute are not the ultimate findings of fact upon which a judgment for damages can be based, but that they should include the evidence upon which such findings are made, as it said (p. 727) :

“What this additional *evidence* was, or what were the facts which the Commission found established by it, is nowhere stated in the report ; so that we have nothing in the way of the findings of fact required by the statute.”

This view, that the reports should contain a consideration of the facts and a statement of the evidence leading to the ultimate findings of fact, was severely criticized by the Court itself, in the cases at bar ; and the inclusion of the evidence was pronounced to be highly objectionable (p. 728).

3. The Court was of the opinion that the findings upon which the award was made must be included *in the order*, as it said (p. 728) :

“It is only as to the *facts contained in the order* that the order is made *prima facie* evidence.”

It thus ignored the explicit language of Section 14 of the Act, that the findings are to be included in the report. No findings of fact are required by the statute to be included in the order. It is to be noted, however, that, in the cases at bar, the findings were repeated in the order of reparation, which contains the following recital (\*20) :

“And the Commission having on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, *which said report is hereby referred to and made part hereof.*”

4. Even though findings of fact upon which an award of damages are made are properly included in the report, and even though an order of reparation is thereupon made by the Commission, the Court below held that the findings and order do not establish a *prima facie* case of liability for damages under Section 8, in an action under Section 16. Upon this point, it said (p. 729) :

“ The orders themselves of the Commission are not *prima facie* evidence as to the question of liability in a judicial proceeding ; ”

and the Court was clearly of the opinion that independent proof, in addition to the findings, must, in all cases, be given of the damages sustained, as it said (p. 724) :

“ In the prosecution of such a suit (under Section 16), the plaintiff may avail himself, without further proof, of the conclusive administrative finding or order of the Commission, that the defendant was guilty of the violation of the Act complained of, but *must prove the actual damages incurred by him by reason of such violation.* ”

That this was the deliberate conclusion of the Court is made still clearer by its assertion that the award of reparation is not *prima facie* evidence of anything (p. 723) :

“ Though the award of damages by the Commission, following its finding of fact that a given rate was unreasonable, may be proved as the basis or condition precedent to the institution of a suit for damages authorized by the statute, it is not capable of enforcement as an administrative order, and *is not of itself* evidence of liability, *prima facie* or otherwise, in any judicial proceeding. ”

5. The Court was also of the opinion that the order of reparation is *prima facie* evidence only of the facts therein stated (p. 723) ; and it held that, as no fact was

stated in the order, the order was not *prima facie* evidence of anything.

In this it ignored the fact that the findings were contained in the reports of the Commission (p. 726) and that the statute does not require any findings to be included in the order, which is similar to a judgment following the verdict of a jury.

6. So far does the reasoning of the Court carry it, that it is moved to say (p. 728) :

“ It does not at all follow, as plaintiffs seem to be under the impression that it does, that because the Acts make certain findings of fact *prima facie* evidence of such facts, it also determines their probative force.”

In making this statement, the Court apparently did not stop to consider the meaning of *prima facie* evidence. *Prima facie* evidence of a fact is such evidence as is sufficient to establish the fact, unless rebutted.

Kelly v. Jackson, 6 Pet., 622, 632.

In making the findings and order *prima facie* evidence, the Act, therefore, does determine their probative force, in case the defendant produces no evidence in rebuttal. In considering the effect of orders of reparation, this Court has expressly recognized, in the Mitchell Coal case, that the orders are *prima facie* evidence of the amount of damages.

Mitchell Coal Co. v. Pennsylvania Co., 230 U. S., 247.

In that case, the Court said (p. 258) :

“ Such orders, so far as they are administrative, are conclusive, whether they relate to past or present rates, and can be given general and uniform operation ; since all shippers who have been or may be affected by the rate can take advantage of the ruling and avail themselves of the reparation order. They are quasi-judicial, and only *prima facie* correct in so far as they determine the fact and amount of damage.”

The reason for requiring the Commission to make an order directing the payment of damages and for making that award *prima facie* evidence of the damages sustained, was not only that, after a hearing, an experienced body like the Commission, familiar with the business of carriers and shippers, can estimate the damages sustained much more intelligently and fairly than an ordinary jury, but, principally, because only in this manner would uniformity be made possible (see *ante*, p. 23).

Congress clearly intended that the award should be conclusive on the question of the amount of damages, if the defendant did not exercise its constitutional right of attacking it ; because it expressly recognizes, in Section 16, that the action is " for the enforcement " of the order of reparation.

7. The Court stated, as one of its conclusions (pp. 724-5), that it did not necessarily follow, where an unreasonable rate had been charged, that the complainant had sustained damage or that the damage was the difference between the abrogated and the reasonable rate.

That may be true ; but the conclusion of the Court, based upon this statement, is not sound, namely, that because the damages awarded in that case did represent the difference between the rate abrogated and the reasonable rate, therefore, the award was not *prima facie* evidence of the liability in an action under Section 16. The damages may be the difference in the rates and, presumptively, they are so ; and where, as in the Clark case and in the cases at bar, the evidence before the Commission is not produced on the trial, the Court certainly cannot say that the damages were not properly awarded by the Commission or that the award was not supported by the evidence, or was made on an erroneous theory.

VII. The final conclusion of the Court below, in the Clark case, has already been referred to (*ante*, p. 29), namely, that the findings were not sufficient to support an award of damages (p. 722).

A ready test of this is to consider the procedure that would

be required in a common law action, in the absence of any statute on the subject. In such an action, the facts which it would be necessary to set forth in the complaint would be the shipments, the rates charged, that such rates were unreasonable and to what extent, and that the plaintiff sustained damages. These are the facts that would be submitted to the jury ; and if the jury found them in accordance with the allegations of the complaint, it would be required to return a verdict in favor of the plaintiff for the damages sustained ; and its verdict might be for the difference between the rate extorted and the reasonable rate.

Under the Act to Regulate Commerce, the award of damages takes the place of the verdict of the jury ; and findings that would support a verdict in an action at law would support an award of the Commission under the Interstate Commerce Act. The only findings that the Commission is required to make are the ultimate findings, upon which liability at law may be predicated.

Int. Com. Com. v. L. & N. R. Co., 227 U. S., 88, 91.

## **TENTH.**

### **The first Opinion of the Court below in the cases at bar.**

I. The same critical attitude of the Circuit Court of Appeals, noticeable in the Clark case, is also indicated in the cases at bar.

1. Although the second proceeding, to recover the damages for the unreasonable rates charged subsequent to July, 1907, was decided at the same time as the first proceeding, and upon the same evidence, the Court calls attention (\*264) to the fact that the report in the second case did not include the findings of the original report, although the finding of unreasonableness is expressly made on the basis of the previous decision ;

and it raises the question as to whether it was competent for the Commission to do this.

2. The Court parenthetically and disparagingly observes (\*243), that the theory of the petition seems to have been to enforce an order of reparation, not to recover the damages sustained, although, in its statement of the facts, it had previously recognized the fact (\*237) that the plaintiff had instituted a suit, under Section 16, "to recover damages alleged to have been incurred."

The causes for which the plaintiff claimed damages were set forth in the petition, and also "the order of the Commission in the premises", as required by Section 16; and, as issue was joined by the service of a plea (75), the mere form of the demand for relief became immaterial.

Bell v. Merrifield, 109 N. Y., 202, 207.

In asking that the order of reparation be enforced and that the plaintiff be given the relief to which he might be entitled on the facts stated and for judgment for a sum specified, the plaintiff did everything that even a special pleader at common law would have considered necessary. The damage being, *prima facie*, that found by the Commission, to which the plaintiff is entitled if no rebutting evidence be given, it is reasonable and proper that the pleader should demand judgment accordingly; and that was recognized by this Court in the Abilene Cotton Oil case (204 U. S., 426), where the Court said (p. 438):

"In the event of the failure of the carrier to obey the order of the Commission \* \* \*, the party in whose favor an award of reparation was made was empowered to *compel compliance* by invoking the authority of the courts."

In Robinson v. B. & O. R. Co. (222 U. S., 506), this Court said (p. 509):

"Provision was also made for the enforcement of the order of reparation by an action in the Circuit Court of the United States, if the carrier failed to comply with it."



In *Great Northern Ry. Co. v. United States* (208 U. S., 452), the Court said (p. 468) :

" Now, Section 16 of the prior Act to Regulate Commerce, as amended and re-enacted by Section 5 of the Hepburn Law, prescribes a limitation of two years 'from the time the cause of action accrues' as to 'all complaints for the recovery of damages' before the Commission, and establishes a limitation of one year for the filing of a petition in the Circuit Court *for the enforcement of an order of the Commission for the payment of money.*"

The exact language of the statutory provision thus referred to is that contained in the last sentence of the second paragraph of Section 16, namely :

" A petition *for the enforcement of an order for the payment of money* shall be filed in the Circuit Court or State Court, within one year from the date of the order, and not after."

The practice in the present cases, in asking for the enforcement of the orders of reparation (No. 434, \*12; No. 455, \*9), was, therefore, technically and exactly correct.

3. The Court indulges in italics (see 211 Fed., 796) in commenting upon the fact that the Commission does not, in its supplemental report requiring reparation to be made, include the evidence upon which its conclusion was reached (\*255). But, later (\*258), it refers impatiently to the original report as "this long report," this "voluminous report," "which in itself constitutes a fair sized book" (only 32 pages of the present record; 16-48); and it complains that the report contained (\*256) "a mass of recited evidence, statements, opinions and conclusions of the Commission, all of which were irrelevant to an award of actual pecuniary damage."

II. In its original opinion in the present cases, the Court made it still more clear than it had done in the Clark case, that the findings of fact must be of a formal kind, distinct from the report itself, and that it is not a sufficient compliance with the statute that the findings are included in the report, in spite of the express language of Section 14, that "such re-

port shall *include* the findings of fact on which the award is made."

On this point, the Court below said (\*252) :

"The imperative command of Section 14, that in case damages are awarded, such report shall include the findings of fact on which the award is made *evidently contemplated a distinct enumeration of such findings* by the Commission, with reference to their proposed use in a jury trial."

And, later, the Court, in referring to the findings in the cases at bar, said (\*255-6), that "the requirement of Section 14 \* \* \* has not been complied with by any *express* findings of fact in the supplemental report," but must be looked for, if at all, "in the voluminous pages of the original report," in which "there are no findings of fact *as such*;" but they must be gathered from a mass of matter irrelevant to an award of damages.

This attitude is somewhat surprising, in view of the fact that, in the original report, the Commission, after considering the evidence relating to unjust discrimination, held, in a single sentence (\*36), that the complainants had sustained the allegation in that respect and that reparation should be awarded; and, after considering the question of the reasonableness of the rates subsequent to August 1, 1901, the Commission expressly found, at the very end of the report (\*72-3), that the rates were unreasonable to the extent specified and that complainants were entitled to reparation, which would be made upon further evidence.

It is difficult to understand how the findings could have been made more clearly or concisely, or why, if "a distinct enumeration" of the findings is contemplated by the statute, this was not done in the present cases.

III. The Court below was greatly disturbed by the heavy burden which was thrown upon the jury, by reason of the fact that the reports were admitted in evidence as a whole, and not merely the specific findings upon which the award of damages was based; and, in its earnestness on this point, it said (\*288) :

"No function of a trial judge in such case could be more exigent than that of pointing out to a jury, in a

case where no separate and distinct findings of fact have been made in the report of the Commission, what would properly be considered such findings."

And again (\*292):

"The jury would, therefore, be compelled to examine the voluminous report to discover for themselves whether it contained any findings of fact bearing upon the question as to what actual damages had been suffered by the plaintiff."

Finally, the Court reached the conclusion (\*294), that the trial Court had failed in its duty to the jury, in not pointing out the portions which alone could be considered as findings of fact, and that the report should, therefore, not have been received in evidence.

The Court thought (\*295) that it made no difference that counsel for the defendant (plaintiff) "read to the jury what he stated to be material portions of said exhibits"; because it did not appear what portions were so read; but the record shows that no objections were made to the reading of these portions (\*138).

The Court (\*295) "looked in vain for any directions by the Court to the jury in regard to this important matter." After quoting from the Judge's charge, the Court continued (\*297):

"There is no attempt here or elsewhere in the charge to separate from the mass of statement in the report what might be considered findings of fact or to instruct the jury that the statute, in making such facts *prima facie* evidence of the facts stated, leaves the evidential value of such facts to the jury. On the contrary, as will be seen in the above extracts from the charge, the Court gave the jury to understand that the report and findings of the Commission as to discrimination and unreasonableness, and the award of damages made thereon, were *prima facie* evidence of the plaintiff's case and of the liability of the defendant and conclusive upon the defendant, unless he could rebut the same. In this, we think the court was clearly in error."

If the defendant had given any evidence tending to rebut the findings of the Commission, including the finding of the

amount of damages, there might be some point to all this warmth of criticism. But as there was no evidence given in rebuttal, the question became one purely of law, namely, whether the findings and order were properly made by the Commission in accordance with the requirements of the statute. If they were, then, in the absence of other evidence, they established the fact of the violation of the Act and the amount of damages sustained; and, as there was nothing for the jury to pass upon, it was not necessary to leave anything to the jury. The Court should have directed a verdict in favor of the plaintiff, for the full amount awarded by the Commission, as was done in *Baer Bros. v. D. & R. G. R. Co.* (233 U. S. 479, 484); and if a verdict had been rendered in favor of the defendant, the Court would have been obliged to set it aside, as contrary to the evidence.

Here again, as in the *Clark* case, the Court totally misconceived the effect of *prima facie* evidence that had not been rebutted. How glaring this misconception was is apparent from the following statement of the Court (\*262):

“The statute makes the finding or order *prima facie* evidence of certain facts; but it does not make or attempt to make such facts *prima facie* evidence of anything.”

If the facts found constitute a violation of the Act by the carrier, then these facts and the award of damages therefor, if not rebutted, become evidence of *everything* requisite to the plaintiff's recovery.

## ELEVENTH.

**The supplemental opinion of the Court below,  
after the reargument.**

I. The critical attitude of the Court continues to be manifested in the supplemental opinion, as, for instance, where the Court, in considering the effect of the provision of Section 16

making the findings and order *prima facie* evidence, says (\*314) :

"This *prima facies* of the facts found is an advantage of considerable moment to the plaintiff. It is an expressed exception to the ordinary rule of evidence and should not be extended by implication. It must be confined to the precise meaning of the language of its enactment."

That is not the view entertained by this Court, which has held that the Act is remedial, so far as the questions involved in the cases at bar are concerned, and is to be given a liberal construction. As the Court observed, in the case of the New Haven Railroad Company v. Interstate Commerce Commission (202 U. S., 361, 391), in an opinion written by Mr. Justice WHITE, the great purpose of the Act to Regulate Commerce was to destroy favoritism, by preventing unjust rates; and, as to this, the Court said (p. 391) :

"To this extent and for these purposes, the statute was remedial and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve."

Moreover, *prima facie* evidence is not an "exception to the ordinary rule of evidence," as the Court below asserted. It is one of the elementary rules of evidence recognized at common law. All legal presumptions of facts, of which the number is limitless, constitute *prima facie* evidence thereof.

4 Wigmore on Evidence, Sec. 2490.

II. That the Court below had some misgivings as to the conclusions reached by it in its original opinion and as to the arguments advanced by it in support of those conclusions, is apparent not merely from the fact that it granted a rehearing but from the further extended discussion of the subject contained in the ten pages of its supplemental opinion (151-160). In this supplemental opinion, the Court is carried by the force of its reasoning to the extreme and radical conclusion, that the findings of the Commission and the order of reparation can, under no circumstances, make out a *prima facie* case of

liability in favor of the plaintiff for the damages sustained, but that affirmative proof of such damages must, in every instance, be given. This is asserted in spite of the specific provision of the statute (Sec. 16):

"Such suit \* \* \* shall proceed in all respects like other civil suits for damages, *except* that, on the trial of such suit, the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated."

And yet, it was of this language that the Court below said (\*317):

"It would seem almost an abuse of language to say that the 'facts' of which the findings and order of the Commission are *prima facie* evidence, include the conclusions arrived at by the Commission as to the injury of the plaintiff and the amount of damages sustained."

III. How the Court reached this astonishing conclusion, it is not easy to ascertain from its discussion of what it considered to be "the crucial questions raised by the petition for, and argument at, the rehearing" (\*304). Its main fallacy, to which it devotes most of its attention, is in its discussion of the question of damages. This question it treats, not as one of the construction of Sections 14 and 16, on a point of evidence, but as a pure question of damages, independent of the statute, in the same manner as if it had arisen in an action at law, without previous application to the Commission. The Court discusses the question precisely as if the award by the Commission had not been made. It thus disregards the award and reduces its effect as evidence to a nullity.

The Court misapprehended the position of counsel for Meeker & Co., in its statement (\*311, \*315) that counsel claimed that, where the rates had been found by the Commission to be unreasonable, the damages, "as a matter of law", must be the difference between the rate charged and the rate found to be reasonable. That is not the contention of counsel for Meeker & Co. While, for the reasons heretofore stated (*ante*, pp. 20-24), they believe that the difference between the rate extorted and the rate that should have been charged

properly represents the liability of the carrier to the shipper, yet it is not necessary for them, in the present cases, to maintain that proposition. It is sufficient for the present discussion if the difference between the two rates *may* represent the reparation which the carrier should make; and, indeed, it is sufficient unless it is the law that the difference between the two rates, that is, the amount of the overcharge, can *never* represent the liability of the carrier. For, if the Commission is at liberty, in a single instance, to award reparation in the amount of the overcharge, then the award becomes *prima facie* evidence of the amount of the liability under Section 16. This distinction between the proof required in an action at law, without previous application to the Commission, and in an action under Section 16, after an award has been made by the Commission, is entirely lost sight of in the supplemental opinion of the Court.

The Court also misapprehended the contention of counsel for Meeker & Co., in stating (\*307-8) that they seemed to argue that the Act created a "general" liability (meaning a liability in favor of the general public) as soon as a violation of it was shown. Counsel have never contended, nor have they ever entertained the remotest notion, that a violation of the Act creates a liability in favor of any one, except, as expressly stated in Section 8, "the person or persons injured thereby". It is their contention, however, that if the Commission finds that a shipper has been charged unreasonable or discriminatory rates, that finding creates a liability in his favor against the carrier, under Section 8, and that it is a liability even if the Commission does not award any damages by way of reparation. If no award is made, the case is the ordinary one of nominal damages, that is, it is the familiar case of *damnum absque injuria*.

IV. What the Court states (\*308-10) on the subject of the right to maintain an action for the damages occasioned by a direct violation of the statute, without previous application to the Commission, except where the question of the reasonableness of the rates is involved, is undoubtedly sound; but it has nothing to do with the questions involved in these cases, because the Commission was first appealed to and did find that the rates were discriminatory and unreasonable.



V. The Court below laid great stress upon the provision of Section 18, that the suit "shall proceed in all respects like other civil suits for damages" (\*313); and it argued from this that the jury must, in all cases, assess the damages, even though there has been an award by the Commission, made upon proper findings, showing a statutory liability on the part of the carrier. It disregarded the exception, which makes the findings and order *prima facie* evidence of the facts; and it attempted to justify this by the following reasoning (\*313):

"Such facts may or may not be relevant to the question of the liability for or amount of damages claimed. Their evidential value in this respect is for the Court and jury trying the case."

And again (\*317):

"The sixteenth Section nowhere says that the report, findings or order of the Commission are *prima facie* evidence of the liability of the defendant or of the amount of such liability. It only says, and we must again refer to its exact language, that the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated. But, clearly, such facts are not made *prima facie* evidence of anything. Their evidential value is for the Court and jury to determine. They may or may not be sufficient to make a *prima facie* case, or they may, in the opinion of the Court or jury, be of any greater or less degree of probative force."

This is merely a more emphatic elaboration of the statement which was made in the original opinion (\*288):

"The pertinency and evidential weight and value of the facts as to which the findings and order are *prima facie* evidence, are for the determination of the Court and jury, as in other civil cases. They may or may not make out a *prima facie* case for the plaintiff."

The Court was clearly in error in supposing that there was anything for the jury to consider in a case, such as this, where no rebutting evidence is offered by the defendant. In that case, where there is no conflict of evidence, the questions in-

volved become purely questions of law for the determination of the court. These questions are, whether the findings are in proper form, whether they are supported by any evidence, and whether, if so, they show liability under the statute justifying an award of damages. In the cases at bar, the defendant was not at liberty to raise the point that the findings were not supported by any evidence, because it did not choose to offer in evidence the record of the proceedings before the Commission. The discussion of the evidence by the Commission, however, contained in the original report, shows that there was abundant evidence to support the findings. The only legal question involved in the present cases, therefore, was whether the findings made out a case of liability under Section 8. The Circuit Court of Appeals gave its own answer to this, when it said (\*315):

“In the present case, we have the unquestioned findings of the Commission, that the rates charged were unreasonable and that a certain lower rate was reasonable.”

And, in its original opinion, it also recognized that the Commission had found that discriminatory rates had been charged in 1900 and 1901, and that there had been specific findings of fact of the “undisputed tonnage” shipped by complainants (\*293-4).

The facts thus found constituted a clear violation of the Act, which the trial Court could not ignore. Indeed, in its original opinion, one of the propositions formally laid down by the Circuit Court of Appeals was that (\*272, \*287-8) “the finding by the Commission that a given rate is unreasonable \* \* \* establishes a violation of the Act”. And when, upon the facts thus found, the Commission made an award of damages, such award constituted an additional finding of fact of the damages sustained, which the trial Court was not at liberty to leave to the consideration of the jury, if it was not controverted by the defendant.

To say, as the Circuit Court of Appeals did, that the facts found “are not made *prima facie* evidence of anything”, is to disregard the explicit language of the statute; and to say that “their evidential value is for the Court *and jury*” to determine, is not only to hold that the jury has the right

to pass upon questions of law, but it is opposed to the positive provision of Section 16, that these facts shall be *prima facie* evidence ; which means that they become controlling evidence, entitling the plaintiff to judgment, if not rebutted.

VI. The Court below assumed, throughout its entire argument, that the award of damages is not a finding of fact but is a conclusion of law, having no probative force whatever ; but, as heretofore stated, the award of damages is necessarily a finding of fact. When the Commission refuses to make an award, that is a finding that, in its opinion, no damages have been sustained. When it makes an award, that award constitutes its finding of the damages, in precisely the same manner as does the verdict of a jury.

13 Cyc., 233.

This obvious and elementary principle was recognized by the Court below, in another connection, when it said (\*318) :

“ What those damages may be *is a question of fact*, to be determined by the jury, and not a question of law.”

VII. The reasoning of the Court below is based upon the proposition, that there is a fundamental difference between the facts found by the Commission showing a violation of the statute and a consequent liability on the part of the carrier, and the fact of the damages sustained. But there is no such difference. The Court asserts (\*316), that Congress intended to preserve the right to a jury trial secured by the Seventh Amendment ; and it assumes that the shipper would be deprived of this right if the award of the Commission were made *prima facie* evidence of the damages ; and it argues that to hold otherwise would make a “ mockery ” of the trial (\*318), because the award would become conclusive, inasmuch as the liability represents the overcharge.

As heretofore pointed out (*ante*, pp. 44-5), the liability is not necessarily the difference between the two rates. That depends upon the finding of the Commission in that respect ; and the award does not become conclusive, by being made *prima*

*facie* evidence of the damages sustained, unless the defendant fails to present evidence in rebuttal, any more than do the facts from which the liability arises.

In an ordinary action at law, the parties have just as much right to a jury trial upon the issues of fact claimed to constitute the liability as upon the amount of the damages resulting from the liability. Congress, therefore, had just as much right to make the finding of damages by the Commission *prima facie* evidence, in an action brought under Section 16, as the other facts from which the liability springs. Indeed, there was a greater reason for making the award *prima facie* evidence, not merely because the Commission, with its wide experience, could assess the damages more intelligently and consistently than an ordinary jury, but because it was desirable that all shippers, under similar conditions, should recover uniform damages and thus not be subject to the discrimination that would be inevitable if different juries were to assess the damages of different shippers. That was the powerful reason which led to the decision of this Court in the Abilene Cotton Oil case; and it was emphasized recently in the Mitchell Coal case (230 U. S. 247, 255-6).

So important is the order of reparation, that an action cannot be maintained to recover damages for an unjust discrimination involving the question of reasonableness, without first obtaining an order of the Commission.

Robinson v. B. & O. R. Co., 222 U. S., 506.

The Court below seemed to regard it as unthinkable that an award of the Commission should be *prima facie* evidence of the damages sustained; and it asks, with much feeling (\*314):

“Is a defendant to be called upon practically to prove a negative and show that the plaintiff was not damaged or that the amount claimed was less than that stated by the Commission?”

The defendant is always called upon to do precisely that thing, where a *prima facie* case has been made out by the plaintiff.

VIII. The Court seemed to have difficulty in reconciling the fact that the award made in favor of a complaining shipper should be *prima facie* evidence in his favor, in an action under Section 16, but that such would not be the case with other shippers similarly situated (\*310-11). Under the view taken by this Court in the case of the Mitchell Coal Company (230 U. S., 247, 255-7), the finding by the Commission that unreasonable rates have been charged and the further finding of what rates should have been charged, together with an order of reparation, enure to the benefit of all shippers under the same conditions; for, only in this manner, can equality among shippers be preserved. Thus, all shippers, as the Court stated in that case, "can take advantage of the ruling and avail themselves of the reparation order" (p. 258).

## **TWELFTH.**

### **Some general observations on both Opinions of the Court below.**

I. In both opinions in the cases at bar, as well as in the Clark case, the Court below held that the decision of this Court, in the International Coal case, was decisive upon it (\*297-8, \*318).

We have already shown (*ante*, pp. 24, 32), that the International Coal case has no bearing upon the question raised under Section 16 of the Act, *where there has been a hearing and an award by the Commission.*

II. The Court below ignored the fact stated by the Commission in its supplemental report (\*19), that the Railroad Company had conceded that the award of the amount due was correctly made by the Commission, if the Company was liable for any damages at all.

III. Neither on the trial nor in the Circuit Court of Appeals, did counsel for the Railroad Company manifest any in-

tention to raise any question as to the amount or measure of damages. On the contrary, their objections to the admission of the reports and orders (60-71), and their assignment of errors (102-110), were based on the assumption that the statute did make the findings and order *prima facie* evidence, not only of the liability but also of the damages sustained, but that Congress had no power to give such effect to the findings. Thus, one of the objections to the admission of the order, and an assignment of error for overruling the objection (\*221-2), was as follows (\*113) :

" We object to the order now offered, on the ground that the statute \* \* \* is unconstitutional, in that it deprives the defendant of due process of law, it not being within the power of Congress to provide by legislative enactment that the Interstate Commerce Commission can make findings upon which there may be a claim for reparation of damages to a petitioner before that body, and then provide that on the trial of a suit to recover such alleged damages, the finding and order of the Commission shall be *prima facie* evidence of the facts therein stated."

And again (\*114) :

" We object to the admission of the order, on the further ground that it appears on the face of the order, that the total amount ordered by the Interstate Commerce Commission to be paid was the sum of several amounts claimed, on several separate shipments of coal between November 1, 1900, and July 17, 1907; that each shipment is the basis of a separate cause of action, and the order is inadmissible as not specifying as to each the amount awarded by the Commission; that the order fails to state as to each shipment the amount found to be due by the Interstate Commerce Commission, and therefore, the order is not under Section 16 *prima facie* evidence as to any of the causes of action here sued upon."

It was this question of damages, which counsel for the Railroad Company had not raised, upon which the Circuit Court of Appeals laid so much stress in its supplemental opinion and upon which, in the last instance, it was apparently disposed to rely for its reversal of the judgments; and

its original ground, that the findings did not comply with the requirements of the statute, was allowed to slip into the background.

The points that counsel for the Railroad Company did insist upon at the trial and in the Court below, were that the provision making the findings and order of the Commission *prima facie* evidence was unconstitutional, as it deprived the carrier of its right to a trial by jury (\*96-7, \*100, \*107-8, \*113), and that the Commission could not regulate or establish rates for the past but only for the future (\*97-99).

The latter contention is answered by the decisions of this Court in the Abilene Cotton Oil case and in the Mitchell Coal case. The contention as to the unconstitutionality was answered by the Court itself, in its original opinion (\*245).

IV. In holding that the findings and order did not make out a *prima facie* case of the extent of the liability for which the plaintiff was entitled to judgment, the Court below not only ignored the explicit provisions of Section 16 but also the provision contained in the first sentence of that Section, requiring an order to be made directing payment of the award. That order would be quite useless if it were given no probative force in an action. It would be idle to make an order, if the carrier could disregard it and compel the shipper to prove his damages in court, *de novo*.

V. The Act to Regulate Commerce was not only intended to prevent wrongs to shippers but to make their redress simple and inexpensive. But, on the theory of the Court below, the Act has had the contrary effect; for, instead of being able to proceed in court in the first instance, the shipper must now, at least where the rates are unreasonable, first proceed before the Commission and be at the expense, as in the present case, of a hearing upon the question of the damages sustained, while the finding of the damages by the Commission does not advance his claim for compensation in the slightest degree. Having been put to this delay and expense, he must then bring an action to try the question all over again. The language of the statute would have to be very clear and imperative to lead to such a conclusion. Moreover, such action by the shipper would destroy



all equality among shippers, as this Court pointed out in the Mitchell Coal case (230 U. S., 257).

VI. In every statute of regulation by a Commission, the procedure required for the orderly despatch of business inevitably tends towards a certain amount of formality and fixedness, which, if carried too far, will destroy one of the objects of the Act, which was to protect the public without constant resort to the courts. This tendency would be enormously increased, if the courts should construe the Act in the spirit shown by the Court below in the cases at bar. A shipper cannot establish the facts in a case such as this without a very heavy expenditure of time and money. The hearings in the present cases occupied about four years (\*138); and the "voluminous exhibits", to which the Commission refers in its original report (\*72), represented a condensed summary of the results obtained by expert evidence and the careful examination and consideration of a multitude of facts. Is it possible that all this is to go for naught, if the Commission fails to make its findings in some particular form, even though the statute does not prescribe the form, and that, without any fault on his part, the shipper is to be deprived of all relief (for that is what it would mean) because the Commission had failed to comply with some technical point of procedure, although its findings are clear and unambiguous and its award of relief is definite and unmistakable?

This Court has recently answered the question in *Baer Bros. v. Denver & R. G. R.* (233 U. S., 479, 488) :

"It would punish the shipper for the failure of the Commission. It would deprive him of his award of damages for his private injury, because of the Commission's omission to make a rate for the benefit of the public."

Obviously, the only reason for requiring any findings to be made is that the Court may see that there is a legal basis for awarding damages. But where the ultimate facts constituting the violation of the statute are found, the requirements of the statute are sufficiently complied with.

The modern tendency in legal procedure is for greater liberality in pleading and practice.

*Baker v. Warner*, 231 U. S., 588, 593.

That tendency will not be defeated by this Court by insisting upon technical procedure under an Act whose object was to simplify the practice in cases arising between shippers and common carriers.

VII. That the Court below was not convinced by its own reasoning, in the cases at bar and in the *Clark* case, is evident from the fact that it has certified to this Court, for its decision, in the case of *Pennsylvania R. Co. v. Jacoby & Co.*, two of the questions which it decided against *Meeker & Co.* in reversing the judgments in their favor, namely:

"(2) Were the finding and the order quoted above, or was either of them, *prima facie* evidence of themselves, or of itself, that the defendant had become liable to *Jacoby & Co.* in some amount by the discriminating practices referred to?

(3) If the finding and the order, either or both of them, were *prima facie* evidence that the defendant had become liable in some amount, were they, or was either of them, *prima facie* evidence also of the amount of such damage?"

The Court would certainly not have certified these questions, if it had not had great misgivings as to its conclusions in the *Clark* and *Meeker* cases.

*Lau Ow Bew*, 141 U. S., 583, 587.

### **THIRTEENTH.**

#### **The Statute of Limitations.**

Among other amendments of the Interstate Commerce Act, made by Section 5 of the Hepburn Act of 1906 (34 Stat. L., 590), was the following amendment of Section 16:

"All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues and not after, and

a petition for the enforcement of an order for the payment of money shall be filed in the Circuit Court or State Court within one year from the date of the order and not after; *provided that claims accrued prior to the passage of this Act may be presented within one year.*"

The first proceeding before the Commission was instituted on July 17, 1907 (\*10); and, as heretofore stated, the Commission awarded damages for unjust discrimination from November 1, 1900, to August 1, 1901, and for unreasonable rates from August 1, 1901, to the commencement of the proceeding. On the trial of the actions under Section 16, the trial Court overruled the objections of defendant's counsel to the recovery of any damages prior to July 17, 1905, that is, prior to a date two years before the commencement of the proceeding; the objection having been based on the ground that the amendment of 1906, above quoted, barred all claims existing at the time that were more than two years old (\*110). But the Circuit Court of Appeals sustained the contention and held that it was "the evident intent of Congress" to preserve the two year limitation, both as to claims maturing before and after the amendment, and that the Commission, therefore, had no jurisdiction to entertain the claim of Meeker & Co. for any damages accruing prior to July 17, 1905 (\*265-6). This view of the Court was adhered to in the supplemental opinion (\*319-320).

The effect of the decision, in applying the two year statute, was to bar at least 75% of the entire amount of the claims of Meeker & Co., or approximately \$97,518.57 out of the total award of \$128,004.26.

I. In holding that the two year statute applied to claims existing at the time of the amendment, the Court reached a conclusion different from that which had long been recognized by the Commission.

Nicola v. L. & N. R. Co., 14 I. C. C. Rep. 199, 206;  
Fels v. Penna. R. Co., 23 I. C. C. Rep., 483, 487.

The official ruling of the Commission on the subject, made for the guidance of shippers, was as follows:

"Claims filed with the Commission since August 28th, 1907 must have accrued within two years prior to

the date when they are filed ; otherwise they are barred by the statute. Claims filed on or before August 28th, 1907, are not affected by the two years limitation."

I. C. C. Conference Ruling, Bulletin No. 5, Rule 10.

II. This construction of the Act by the Commission has also been recognized by the Circuit Court of Appeals for the Sixth Circuit.

L. & N. R. Co. v. Dickerson, 191 Fed., 705, 711-12 ;

A. J. Phillips Co. v. Grand Trunk Ry. Co., 195 Fed., 12, 19.

III. Prior to the passage of the amendatory Act of 1906, there was no limitation in the Act to Regulate Commerce ; and the statutes of the various States were, consequently, held to be applicable.

Ratican v. Terminal R. Ass'n., 114 Fed., 666, 668 ;  
Carter v. New Orleans R. Co., 143 Fed., 99 (C. C. A., 5th Circ.) ;

Lyne v. D., L. & W. R. Co., 170 Fed., 847.

Under the Pennsylvania statute, which was applicable to the claims involved in these actions, the limitation was six years.

Stewart's Purdon's Digest (13th Ed.), 2282.

IV. The decision of the Court below would render the amendatory Act of 1906 unconstitutional. Until the time of the passage of that Act, Meeker & Co. had an existing claim, which dated back to August, 1901, the date when the 65% contract was put into effect, making the rates retroactive to November, 1900 (\*31).

According to the construction placed on the amendatory Act by the Court below, the entire claim of Meeker & Co. prior to July 17, 1905, was barred, although no time whatever had been given to them to assert their claim. It is thoroughly well settled, however, that a statute of limitations, in so far as

it applies to accrued rights of action, is unconstitutional, unless a reasonable time is allowed for their enforcement.

19 Am. & Eng. Enc. of Law (2nd ed.), 169-171 ;  
 25 Cyc., 986 ;  
 Cooley on Const. Lims. (7th ed.), p. 523 ;  
 Black's Const. Law (2nd ed.), p. 498 ;  
 Terry v. Anderson, 95 U. S., 628 ;  
 Sohn v. Waterson, 17 Wall., 596.

When possible, a statute will always be construed in such manner as to render it constitutional.

Sohn v. Waterson, *supra*.

V. The error of the Court below upon this point was in disregarding the plain terms of the proviso, that claims which had accrued prior to the passage of the Act might be presented within one year. The importance of this proviso was noticed by this Court in Great Northern Ry. Co. v. United States (208 U. S., 452), where the Court, in discussing the limitation contained in Section 16, said, by Mr. Justice WHITE (p. 468) :

" Now Section 16 of the prior Act to Regulate Commerce, as amended and re-enacted by Section 5 of the Hepburn law, prescribed a limitation of two years ' from the time the cause of action accrues ' as to ' all complaints for the recovery of damages ' before the Commission, and establishes a limitation of one year for the filing of a petition in the Circuit Court for the enforcement of an order of the Commission for the payment of money. *But the Section contains a proviso, saving the right to present claims accrued prior to the passage of the Act, provided the petition be filed within one year.*"

VI. Some point was made by counsel for the Railroad Company, in the Court below, that the amendment took effect on June 29, 1906, and that, as the claim of Meeker & Co. was not filed until July 17, 1907, it was not filed within the year permitted by the proviso. The Court below was not impressed by this contention ; and it was without merit.

As the Commission pointed out in the Nicola case (Nicola v. L. & N. R. Co. 14 I. C. C. Rep., 199, 206), there are many

authorities holding that the phrase, "passage of this Act," refers to the time when the Act takes effect.

36 Cyc., 1197-8 ;  
 26 Am. & Eng. Enc. of Law (2nd Ed.), 565 ;  
 Matter of Howe, 112 N. Y., 100 ;  
 Harding v. People, 10 Colo., 387 ;  
 Patrick v. Perryman, 52 Ill. App., 514 ;  
 Osborn v. Charlevoix, 114 Mich., 655 ;  
 State v. Bennis, 45 Neb., 724.

Congress passed a Joint Resolution on June 30, 1906, as follows :

" The Act entitled, ' An Act to amend an Act entitled " An Act to Regulate Commerce ", approved February 4th, 1887, and all other Acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission ', shall take effect and be in force sixty days after its approval by the President of the United States."

34 Stat. L., 838.

The title of this Joint Resolution was as follows :

" Joint Resolution (S. R. 72), fixing the date upon which the Act to amend an Act entitled ' An Act to Regulate Commerce ', approved February 4th, 1887, and all other acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission ', approved June 29th, 1906, shall go into effect."

The purpose of this Joint Resolution was, as stated in its title, *to fix the date* upon which the amendatory Act should go into effect ; and the time thus fixed was " sixty days after its approval by the President of the United States ". This approval was given by the President on June 30, 1906 ; and sixty days thereafter would be August 28, 1906. Consequently, one year under the proviso within which the present accrued claims would not expire until after July 17, 1907, when the original complaint was made to the Commission.

A Joint Resolution, approved by the President, has all the force and effect of a bill.

8 Fed. Stats. Ann., 338 ;  
 Story on the Constitution (5th Ed.), Sec. 892 ;  
 6 Opinions of Attys. Gen. 680.

The purpose of the Joint Resolution of June 30, 1906, is obvious. The amendment provided that it should take effect immediately; but the machinery for putting it into effect could not be immediately provided, and there was no time for passing an Act amending this clause. The Joint Resolution was consequently adopted, with the same effect as a formal amendment. Even assuming that the Amendment became a law on June 29, 1906, its operation was certainly suspended for sixty days by the Resolution, and its effective date, by the specific terms of the Resolution, was made sixty days later (August 28).

Moreover, the limitation was that "claims accrued prior to the passage of this Act may be presented within a year." Within a year from what date? Clearly within a year after the Act became effective, so that claims could be presented under it. Certainly, after the Joint Resolution had been approved on June 30, no claims could be presented under the Amendment until August 28; and surely Congress did not intend that the sixty day extension should curtail the time allowed for the presentation of accrued claims.

## **FOURTEENTH.**

### **Attorneys' fees.**

The trial Court fixed and taxed, as part of the costs, the attorneys' fees both for services performed in the proceeding before the Commission, in each case, and for those in the two actions. (No. 434, \*212; No. 435, \*120). These amounts were determined upon presentation of the record of the proceedings before the Commission and upon the oral statements of plaintiff's counsel in open Court, without objection. The Circuit Court of Appeals did not pass upon the question of the allowance of these fees.

I. Upon the review of the judgments in the Court below, counsel for the Railroad Company did not print the Record before the Commission, nor insert in it the oral statements



made by plaintiff's counsel for the information of the Court in fixing the fees. The plaintiff in error was, therefore, not at liberty to question the amounts allowed by the Court for the attorneys' fees.

II. Section 8 of the Act to Regulate Commerce provides that if any common carrier does an act prohibited or declared to be unlawful, it shall be liable to the person injured for the damages sustained, "*together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery*, which attorney's fee shall be taxed and collected as part of the costs in the case." Section 16 of the Act, providing for an action to be brought after the entry of the order of the Commission awarding damages, further provides that "if the petitioner shall finally prevail, he shall be allowed a reasonable attorney's fee, to be taxed and collected as part of the costs of the suit."

In the Court below, it was the contention of counsel for the Railroad Company, that, where an action is brought under Section 16 to recover damages awarded by the Commission, the court, in fixing the attorney's fee, is limited to the services rendered in that action, and has no power to fix a fee for services rendered in the proceeding before the Commission.

III. Even if it should be conceded, for the sake of the argument, that the attorney's fee specified in Section 16 was intended to apply only to services rendered in connection with the action in which the judgment is obtained, that would not preclude the court from taking into consideration the services previously rendered before the Commission; because, the preliminary application to the Commission is always proper, and, in the case of unreasonable rates, it is a condition precedent to the maintenance of the action under Section 16. The services before the Commission, therefore, constitute part of the services required for the successful maintenance of the action and may properly be taken into consideration in fixing the amount to be allowed for the services in the action.

IV. Even if no action has been brought under Section 16, the court would, at any time, have had the right to fix the at-

torney's fee for the services before the Commission ; and the mere fact that the application was not made until an action had been commenced did not deprive the Court of this power. Section 18 is explicit in providing that, "*in every case*" where damages are awarded by the Commission, the carrier shall be liable also for the attorney's fee, to be fixed by the court. Therefore, when, in the present case, the Commission made an award of damages to the complainant, the Railroad Company immediately became liable for an attorney's fee, to be fixed by the court.

It is not necessary that an action should be pending to give the court this power to fix the fee under Section 8. No action will be brought where the order of the Commission directing payment is complied with. In such case, the court which would have this power would undoubtedly be the court before which the action under Section 16 would be tried, if one were brought.

*Re Account of the Dist. Atty., 23 Fed., 26 ;*  
*United States v. Bashaw, 50 Fed., 749.*

When the orders of the Commission were originally made in the cases at bar, the complainant might then have applied to the District Court, in the Eastern District of Pennsylvania, to have the attorney's fee, under Section 8, fixed. Therefore, in fixing the fees in the trial Court, the amount allowed for services before the Commission was properly awarded in pursuance of the power conferred by Section 8, and the amount allowed for services in the action was properly awarded in pursuance of the power conferred by Section 16.

Inasmuch as the attorney's fee given by Section 8 is payable only in the event of a recovery by the complainant, it obviously would be idle to ask the court to fix the amount under Section 8 before it was known whether the carrier would comply with the order for payment or would resist the order and force the complainant to bring an action, under Section 16. The complainant will, therefore, in all such cases, wait until the question of his recovery has been finally determined ; and if he is obliged to commence an action, he will wait until judgment has been rendered ; because, if the order of the Commission should be reversed,

he would not be entitled to an attorney's fee under Section 8, inasmuch as he would not have recovered anything. It is, therefore, good practice, under Section 8, to wait until it has been finally determined, either by compliance with the Commission's order on the part of the carrier, or by the judgment of the court in case the order is contested, that the recovery has become certain. But when that fact has been ascertained, the court may be asked to fix the fee under Section 8, at the same time that it fixes the fee under Section 16.

V. It makes no difference whether Section 16 was intended to include the fee for legal services rendered before the Commission or whether it is limited to services actually performed in the action. If the latter is the correct construction, there is nothing inconsistent in it with the provisions of Section 8 making the carrier liable for the legal services in the proceeding before the Commission. The only possible loophole of escape from this liability imposed by Section 8 must be based on the proposition that the provision under Section 16, authorizing a fee in the action, nullifies the provision in Section 8, making the carrier liable *in every case* of recovery for the fee in the proceeding before the Commission. It is a cardinal rule of construction, that effect must be given to every part of a statute, unless the repugnance of the later provision to the earlier one is so clear that the two cannot both stand. But there is not the slightest inconsistency between the two provisions in Sections 8 and 16, one of which is for services before the Commission and the other for services in the action.

VI. Sections 8 and 16 reveal clearly the legislative intent to throw the entire expense of an unsuccessful contest on the common carrier. The object of the Interstate Commerce Act was to protect the shipper against the arbitrary and unjust acts of the common carrier. This object could not be effectively accomplished unless it was practicable for the shipper to establish his grievances before the Commission.

But he could rarely do this, if the cost of the proceeding were thrown upon him.

Seaboard Air Line R. Co. v. Seegers, 207 U. S., 73, 77-8;

Riverside Mills v. Atlantic Coast Line R. Co., 168 Fed., 990, 992.

To make the Act efficient, therefore, it was essential that all the legal expenses connected with the proceeding should be paid by the carrier, in all cases where the carrier was found guilty of a violation of the Act.

VII. If the effect of the action, under Section 16, was to limit the power of the Court to the legal services rendered in that action and to nullify the power conferred upon the court by Section 8, then it would always be possible for the carrier to avoid the liability for the attorney's fee, imposed by Section 8. All that it would have to do would be to refuse to comply with the order of payment and force the shipper to bring an action. It is inconceivable that Congress intended to permit a carrier to so palpably evade this liability under Section 8, by the simple expedient of disregarding the order of the Commission and putting the shipper to further trouble, expense and delay in the enforcement of his right. No matter how glaring the violation of the statute had been by the carrier, no matter how costly the proceeding before the Commission, nor how certain that the order of the Commission would be enforced by the Court, the carrier could completely avoid all liability for the legal services before the Commission by disregarding the order and forcing the complainant to bring an action under Section 16. The Court will certainly not construe the statute in that way, and thus reward the guilty party and penalize the innocent and successful party. This would clearly be to disregard altogether the legislative intent.

**FIFTEENTH.**

This Court should direct the judgment that should have been entered by the Circuit Court of Appeals.

Delk v. St. Louis & San Francisco R. R., 220 U. S., 580, 589;

Baker v. Warner, 231 U. S., 588, 593 ;

Baer Bros. v. Denver & R. G. R. Cp., 233 U. S., 479, 490.

The judgment of the Circuit Court of Appeals, in each case, should, therefore, be reversed, and the judgment of the trial Court, in each case, should be affirmed in all respects.

Washington, October, 1914.

WILLIAM A. GLASGOW, JR.,

JOHN A. GARVER,

Counsel for Petitioner.

Office Supreme Court, U. S.  
FILED  
MAY 9 1914  
JAMES D. MAHER  
CLERK

Supreme Court of the United States.

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October Term, 1913.

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No. 1000. **434**

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HENRY E. MEEKER, surviving partner, etc.,  
*Plaintiff-in-error,*

against -

LEHIGH VALLEY RAILROAD COMPANY,  
*Defendant-in-Error.*

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No. 1001. **435**

---

HENRY E. MEEKER,

*Plaintiff-in-error.*

against

LEHIGH VALLEY RAILROAD COMPANY,  
*Defendant-in-Error.*

---

**PETITION TO ADVANCE.**

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Now comes Henry E. Meeker, the plaintiff-in-cr-

ror in the above entitled causes, and respectfully pray that this Honorable Court will advance the said causes upon the docket of the Court and set the same for argument at as early a date as may to the Court seem advisable, and if agreeable to the Court at the beginning of the docket for the October Term, 1914.

The matter involved is the construction of certain provisions of the Act to Regulate Commerce. The reasons for advancing these causes are the same as those set forth in the petition and brief filed herein upon application for writs of certiorari, which were denied by this Court on April 13, 1914; and the plaintiffs-in-error respectfully refer the Court to the said petition and its brief and the brief on behalf of the Interstate Commerce Commission for a more detailed statement of said reasons.

Respectfully submitted,

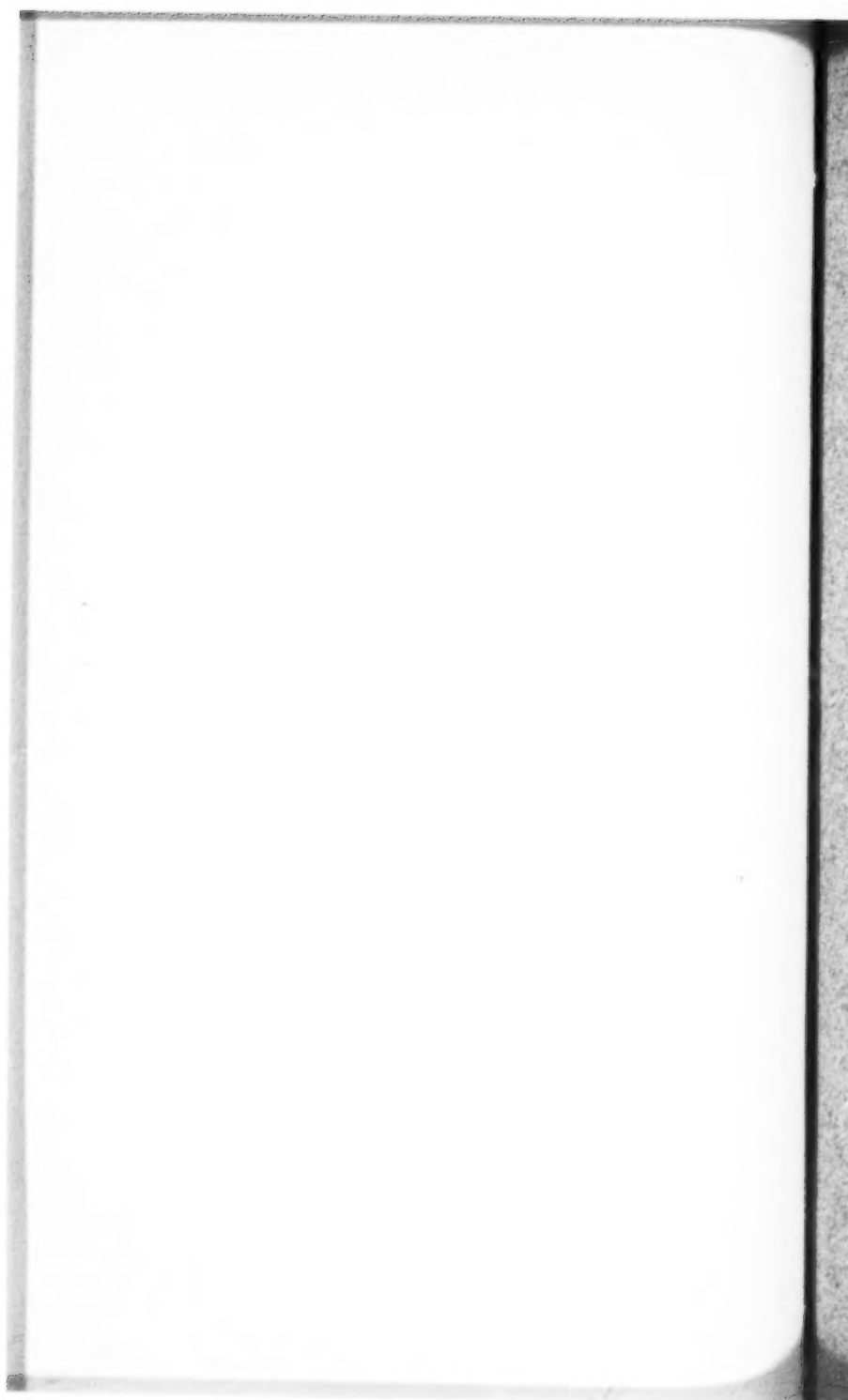
WILLIAM A. GLASGOW, JR.

JOHN A. GARVER,

*Counsel for plaintiff-in-error.*



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FILED

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JAMES E. MEEKER  
CLERK

IN THE

# Supreme Court of the United States.

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OCTOBER TERM, 1914.

No. 434.

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HENRY E. MEEKER, Surviving Partner of the Firm  
of Meeker & Company,

*Petitioner,*

*vs.*

LEHIGH VALLEY RAILROAD COMPANY,

*Respondent.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE THIRD CIRCUIT.

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## BRIEF FOR LEHIGH VALLEY RAILROAD COMPANY, RESPONDENT.

---

EDGAR H. BOLES,  
*Solicitor for Respondent.*

JOHN G. JOHNSON,  
FRANK H. PLATT,  
GEORGE W. FIELD,  
*Counsel.*

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**In the Supreme Court of the United States,**

OCTOBER TERM, 1914.

HENRY E. MEEKER, surviving partner of the firm of Meeker & Company,

Petitioner,

vs.

LEHIGH VALLEY RAILROAD  
COMPANY,

Respondent.

No. 434.

**On Writ of Certiorari to the United States  
Circuit Court of Appeals for the Third  
Circuit.**

**BRIEF FOR RESPONDENT.**

**Statement.**

This action is brought to recover \$107,465.58, with interest (R. 8). The amount covers two claims made by Meeker & Company as shippers of anthracite coal, one based on alleged discriminations and one based on alleged excessive rates. Between November 1, 1900, and July 1, 1907, Meeker & Company shipped anthracite coal from the Wyoming Region in Pennsylvania to tidewater at Perth Amboy, New Jersey, over the Lehigh Valley Railroad. They paid tariff rates.

Note—Although cases Nos. 434 and 435 will be argued together, we have thought it better for greater clearness to submit separate briefs.

Mr. Meeker, as surviving partner, now claims that between November 1, 1900, and August 1, 1901, if his firm had been allowed the rates which were allowed other shippers it would have saved \$11,009.33. His first claim is for this \$11,009.33, which, with interest to August 1, 1912, amounts to \$18,275.49 (R. 8). We shall refer to this first claim as the discrimination claim.

He also claims that between August 1, 1901, and July 1, 1907, his firm paid as freight charges \$685,375.27; that the charges were excessive; that reasonable charges for the service would not have exceeded \$627,138.82. He claims the difference, namely, \$58,236.45, as excessive charges. His second claim is for this \$58,236.45 which, with interest to August 1, 1912, amounts to \$89,190.09 (R. 8). We shall refer to this second claim as the excessive charge claim.

Action was commenced September 3, 1912, by filing of the Petition (R. 3). On October 5, 1912, defendant filed its Plea, denying the claims and pleading the bar of the Statutes of Limitations applicable to the claims (R. 49).

The case was tried before Judge Holland and jury November 11th and 12th, 1912 (R. 50). Verdict was rendered for the plaintiff for the full amount, with interest (R. 50, 99).

December 19, 1912, judgment was entered for \$109,280.17 (R. 100). The Court also ordered that plaintiff's counsel be allowed \$10,000 as a counsel fee for his services in a certain proceeding before the Interstate Commerce Commission; and the further sum of \$10,000 for services in this action (R. 99).

Thereupon defendant filed its bill of exceptions, assignments of error, and its petition for a writ of error (R. 50, 101, 102). Upon order the writ of error was issued December 30, 1912 (R. 101).

The case was reviewed by the Circuit Court of Appeals, which on August 27, 1913, handed down its opinion directing that the judgment be reversed with directions for a *venire de novo* (R. 150). The Appellate Court granted a rehearing and on February 19, 1914, filed its further opinion sustaining the assignments of error and holding that the judgment should be reversed and a *venire de novo* awarded (R. 161). Judgment of reversal was entered February 19, 1914 (R. 161).

Thereafter and on March 30, 1914, Mr. Meeker petitioned this Court for a writ of certiorari, citing the importance of the questions of law involved and the hardship to him if he must go back to the trial Court and thereafter bring the questions to this Court by writ of error after final judgment.

This Court granted the writ on April 29, 1914 (R. 162).

On May 8, 1914, the return was duly filed in this Court (R. 163).

#### *Chronological Statement of Facts.*

The Petitioner, Henry E. Meeker, is the surviving partner of Meeker & Company (R. 50). Meeker & Company were coal dealers who purchased anthracite coal in the Wyoming region of Pennsylvania and shipped it to tidewater at Perth Amboy, New Jersey (R. 51). They shipped their coal over the Lehigh Valley Railroad (R. 51).

July 17, 1907, Meeker & Company filed a complaint with the Interstate Commerce Commission against the Lehigh Valley Railroad Company (R. 59). In their complaint they asked the Commission to compel the railroad to reduce its rates on anthracite coal from the Wyoming region in Pennsylvania, to Perth Amboy, New Jersey. The rates then in effect (July 17, 1907), were

\$1.55 per gross ton of 2,240 pounds, on prepared sizes of coal (including egg, stove and chestnut), \$1.40 per gross ton on pea coal, \$1.20 per gross ton on buckwheat coal, and \$1.10 per gross ton on sizes of anthracite coal smaller than buckwheat coal (R. 73). Meeker & Company asked that all these rates be reduced to \$1 per ton.

But of greater importance to Meeker & Company than the question as to the rate for the future, was an enormous claim for reparation, based on shipments made from time to time, during the preceding seven years.

In said petition, which they filed with the Commission July 17, 1907, Meeker & Company, in addition to asking that the rates be reduced to \$1.00 per ton, demanded reparation from the railroad on account of the shipments they had made between November 1, 1900, and July 17, 1907. They made two distinct claims for reparation—one based upon an alleged discrimination, and the other based upon alleged excessive charges. The discrimination claim covered the period from November 1, 1900, to August 1, 1901. The excessive charge claim covered the period from August 1, 1901, to July 1, 1907. The first or discrimination claim was based on the contention that from November 1, 1900, to August 1, 1901, Meeker & Company paid rates higher than those paid by other shippers. Meeker & Company made various shipments between November 1, 1900, and August 1, 1901, and paid the railroad as freight charges \$129,989.18 (R. 57). They claimed that other shippers were allowed rates, which if applied to their shipments, would have reduced their payments to \$118,979.85, a difference of \$11,009.33, which they claimed as damages.

The second or excessive charge claim was based on their contention that the tariff rates were too high. They claimed that between August 1, 1901, and July 1, 1907,



they had made various shipments from the Wyoming region to Perth Amboy, and had paid at tariff rates \$685,375.27. They claimed as reparation the difference between this amount and what the charges would have amounted to at the rate of \$1 per ton.

The statement in petitioner's brief that the hearings before the Commission occupied about four years is not correct. Counsel refers to page 88 of the record, where he himself stated "That the Commission, after a year and a half of consideration or two years' consideration, found that the rates were unreasonable." The Court then stated "They (the Commissioners) had it before them from 1907 to 1911," to which counsel answered "Exactly, they had it for four years." As a matter of fact, although complaint was filed in 1907, hearings were not commenced until March 23, 1909, and there were in all less than twenty-five hearings.

June 8, 1911, the Commission filed its opinion, at the conclusion of which it stated: "We are of opinion and so find that defendant's rates for the transportation of coal from the Wyoming region to Perth Amboy of \$1.55 per gross ton on prepared sizes, \$1.40 on pea coal, and \$1.20 on buckwheat coal, are unreasonable so far as they exceed \$1.40 on prepared sizes, \$1.30 on pea coal, and \$1.15 on buckwheat" (R. 47).

In addition to this finding to the effect that the present rates (as of June 8, 1911, the date of the opinion) were excessive, the Commission stated, as to Meeker & Company's first, or discrimination claim: "We are of the opinion and so hold that complainants have sustained the allegation of unjust discrimination under the second section of the act. Reparation, with interest from August 1, 1901, will be awarded on this account" (R. 23).

Mecker & Company's second, or excessive charge claim, was referred to in the opinion of June 8, 1911, as follows: "We are further of opinion that reparation should be awarded upon basis of the rates herein found to be reasonable upon all shipments of coal by complainants from the Wyoming region to Perth Amboy since August 1, 1901. The amount of reparation which should be awarded under our finding in this case can not be ascertained from the exhibits now on file, and such further proceeding will be had as may be necessary to determine the amount of money due to complainants" (R. 47).

On the same day (June 8, 1911) the Commission made its order requiring that the rates be reduced, and that for a period of two years thereafter such reduced rates should be the maximum to be charged (R. 48). This order (of June 8, 1911) contains no provision as to reparation.

May 7, 1912, the Commission filed a supplemental report, in which it stated:

"On basis of our conclusions in the former report, and upon consideration of the evidence adduced at the hearing upon the question of reparation, we now find that during the period from November 1, 1900, to August 1, 1901, complainant shipped from the Wyoming coal region of Pennsylvania to Perth Amboy, N. J., 55,257.75 tons of coal of prepared sizes, 16,689.76 tons of pea coal, 11,448.93 tons of buckwheat coal, and 4,926.77 tons of rice coal, and paid charges thereon, amounting to \$129,989.18, at the rates found to have been unjustly discriminatory; that the complainant has been damaged to the extent of the difference between the amount which he did pay and \$118,979.85, the amount which he would have paid had he been given the benefit of the rates ap-

plied by defendant to similar shipments of the Lehigh Valley Coal Company; and that he is, therefore, entitled to an award of reparation in the sum of \$11,009.33, with interest thereon from August 1, 1901. We find further that from August 1, 1901, to July 17, 1907, complainant shipped from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., 246,870.15 tons of coal of prepared sizes, 106,051.09 tons of pea coal and 87,250 tons of buckwheat coal, and paid charges thereon amounting to \$685,375.27, at the rates found to have been unreasonable; that complainant has been damaged to the extent of the difference between the amount which he did pay and \$626,945.62, the amount which he would have paid at the rates found reasonable, less \$193.20 deducted by stipulation of all parties on account of certain claims already paid; and that he is, therefore, entitled to an additional award of reparation in the sum of \$58,236.45, with interest, amounting to \$27,750.64, on the individual charges comprising said sum from the dates of payment thereof to September 1, 1911, together with interest on said sum of \$58,236.45 from September 1, 1911" (R. 11).

On the same day (May 7, 1912) the Commission made a supplemental order in which it stated:

"It is ordered, That defendant, Lehigh Valley Railroad Company, be, and it is hereby authorized and required to pay unto complainant, Henry E. Meeker, on or before the 15th day of July, 1912, the sum of \$11,009.33, with interest thereon at the rate of 6 per cent per annum from the 1st day of August, 1901, as reparation for unjustly discriminatory rates charged for the transportation of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., which rates so charged have been found by this Commission to have

been unjustly discriminatory, as more fully and at large appears in and by said report of the Commission.

"It is further ordered, That defendant, Lehigh Valley Railroad Company, be, and it is hereby authorized and required to pay unto complainant, Henry E. Meeker, on or before the 15th day of July, 1912, the sum of \$58,236.45, with interest thereon at the rate of 6 per cent per annum, amounting to \$27,750.64, upon the various individual charges comprising said sum, from the dates of payment thereof to September 1, 1911, as itemized in Complainant's Exhibit 2, together with interest at the rate of 6 per cent per annum on said sum of \$58,236.45 from September 1, 1911, as reparation for unreasonable rates charged for the transportation of various shipments of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., which rates so charged have been found by this Commission to have been unreasonable, as more fully and at large appears in and by said report of the Commission" (R. 13).

In making the supplemental order (R. 13) the Commission sought to comply with section 16 of the Act to Regulate Commerce, which provides: "That if, after hearing on a complaint made as provided in section 13 of this Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act, for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named."

Section 16 of the Act continues as follows: "If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the Circuit Court of the United

States for the district in which he resides, or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, a petition setting forth briefly the cause for which he claims damages, and the order of the Commission in the premises. Such suit shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated \* \* \*." (There is a further provision as to costs and attorney's fees, and a provision that "A petition for the enforcement of an order for the payment of money shall be filed in the Circuit Court \* \* \* within one year from the date of the order and not after.")

The reparation order was served upon the defendant railroad (R. 72); and the railroad did not comply with such order for the payment of money within the time limit of the order.

Thereupon Mr. Meeker, as surviving partner of Meeker & Company, brought this action in the District Court.

### *The Pleadings.*

The action was commenced by the filing of a petition on September 3, 1912 (R. 3). This petition makes claim for the amounts awarded by the Commission in its order, which the railroad has refused to pay. Attached to the petition as exhibits are the Commission's report of June 8, 1911, and the order as to future rates handed down at the same time (R. 16, 48); also the supplemental or reparation report (R. 10); and the supplemental or reparation order (R. 13).

The petition alleges two groups of causes of action. The causes of action in the first group are based on the

alleged discriminations from November 1, 1900, to August 1, 1901. The causes of action in the second group are based on the alleged excessive freight charges from August 1, 1901, to July 1, 1907.

As to the first group of causes of action, the petitioner alleges that from November 1, 1900, to August 1, 1901, the railroad charged Meeker & Company higher rates than it charged the Lehigh Valley Coal Company, on shipments of the same commodity; and that if the rates which he alleges were given to the Lehigh Valley Coal Company during the period were applied to Meeker & Company's shipments, Meeker & Company would have saved \$11,009.33 (R. 6).

As to the second group of causes of action, petitioner alleges that from August 1, 1901, to July 1, 1907, Meeker & Company paid as freight, at tariff rates, \$685,375.27; that said tariff rates were excessive in so far as they exceeded \$1.40 per ton for prepared sizes, \$1.30 per ton for pea coal, and \$1.15 per ton for buckwheat coal (these last mentioned rates are the rates which the Commission, in its opinion dated June 8, 1911, found to be reasonable as of that date, June 8, 1911); that if these last mentioned rates had been charged between August 1, 1901, and July 1, 1907, instead of the tariff rates actually charged, Meeker & Company would have saved \$58,236.45 and interest (R. 6).

Petitioner demands judgment in this action for \$107,465.58, with interest from August 1, 1912 (R. 8). This amount includes the discrimination claim of \$11,009.33, which with interest to August 1, 1912, equals \$18,275.49; and also the excessive charge claim of \$58,236.45, which with interest to August 1, 1912, equals \$89,190.09 (R. 8).

Defendant's plea, filed October 5, 1912, is as follows: "The defendant, the Lehigh Valley Railroad Company,

for a plea in the above stated case, pleads Not Guilty; and further pleads the bar of the Statute of Limitations applicable to the plaintiff's claim; and for further plea in this behalf defendant avers that the Interstate Commerce Commission has no jurisdiction to make the findings and order of reparation which the plaintiff seeks to enforce by this proceeding, and further that there was before the Commission no substantial evidence to sustain said findings and said order" (R. 49).

### *The Trial.*

At the trial the plaintiff put in evidence the opinion of the Commission dated June 8, 1911, and the order fixing the rates for the future (said opinion and order are offered at page 59, received over objection at page 67, and printed at pages 16 and 48); also the supplemental or reparation report and order, dated May 7, 1912 (said report and order are offered at page 67 of the record, received over objection at page 72, and printed at pages 10 and 14).

As to the first group of causes of action, which we shall refer to as the discrimination claim, and which covers the period from November 1, 1900, to August 1, 1901, the plaintiff introduced no evidence, other than the Commission's opinions and orders, showing or tending to show the existence of the alleged discrimination, or that Meeker & Company were in any way damaged.

As to the second group of causes of action, which we shall refer to as the excessive charge claim, and which covered the period from August 1, 1901, to July 1, 1907, the plaintiff introduced no evidence other than the opinions and orders of the Commission, showing or tending to show that the rates paid were excessive, or that lower rates would have been reasonable or compensatory, or that Meeker & Company were in any way damaged.



At the close of the case, no motion was made by plaintiff for a direction of a verdict or for binding instructions (R. 92). The defendant submitted its points for charge which were argued and refused (R. 94-99). Exceptions were taken by defendant to the admission of plaintiff's proof, to the charge of the Court, and to the refusal of defendant's points to charge. The grounds of the exceptions are repeated in the assignments of error (R. 102).

(We shall call attention to the exceptions and assignments of error in connection with the points to which they apply.)

#### *Respondent's Points.*

The questions of law raised upon this writ will be discussed under the following heads:

FIRST: Plaintiff has failed to prove by competent evidence that the Railroad violated the Commerce Act. Plaintiff relied for his proof, upon the reports and orders of the Commission. These do not prove that Meeker and Company were discriminated against, and do not prove that unlawful rates were charged.

SECOND: Plaintiff has failed to prove by competent evidence that Meeker & Company sustained damage. The measure of damage, if any, should be the loss to Meeker & Company as the result of the alleged discrimination or the alleged unreasonable rate. It does not follow from the conclusion of the Commission that an established rate is unreasonable in so far as it exceeds a stated amount, that a shipper who paid the established rate has been damaged, or that his damage, if any, should be measured by the difference between the two amounts.

THIRD: The Commission's opinions contain statements, arguments and conclusions which the Act does not purport to make admissible as *prima facie* evidence in a suit for damages. In admitting the reports in evidence the trial Court prejudiced the rights of the defendant, making it thereafter impossible for the defendant to place before the jury its side of the case unembarrassed by the incompetent and misleading statements in the opinions.

FOURTH: Section 16 of the Commerce Act is unconstitutional in so far as it deprives the defendant in a damage suit of a fair trial by jury.

FIFTH: The complaint of Meeker & Company before the Commission was filed July 17, 1907, at a time when the right of the Commission to pass upon the greater part of said claims had expired by limitation.

SIXTH: This action was commenced on September 3, 1912, at a time when the plaintiff was barred by limitation from bringing an action upon any of his claims.

SEVENTH: The allowances for counsel fees are invalid and excessive.

**FIRST POINT.**

**Plaintiff has failed to prove by competent evidence that the Railroad violated the Commerce Act. Plaintiff relied for his proof, upon the reports and orders of the Commission. These do not prove that Meeker and Company were discriminated against, and do not prove that unlawful rates were charged.**

The opinions and orders of the Commission were received in evidence, over defendant's objection that they contained no facts and no findings of fact, as required by statute, and contained no facts upon which an award for reparation could be based (R. 63, 68, 70). The defendant requested the Court to direct a verdict for defendant upon the ground that the findings and orders of the Commission contained no facts or findings of fact to support an award of reparation (R. 95). The Court denied the request, and exception was taken. The Court instructed the jury: "It is objected here, that these reports made by the Commission upon which this suit is based, are not in accordance with the requirements of this Act, and that therefore you should find for the defendant. But I instruct you that they are, in the judgment of the Court, in accordance with the requirements of this section. They state the conclusions as required by the Act and they state the findings of fact upon which the award is based, and they make that award in the sums that I have mentioned, upon sufficient findings of fact to sustain this suit" (R. 90). To these charges the defendant excepted (R. 93). The rulings are assigned as error (Nos. 1-18, 24, 26-32, R. 102-104, 106-108).

(a) *As to the Discrimination Claim (November 1, 1900, to August 1, 1901):*

The first part of the opinion of June 7, 1911, contains a discussion of the discrimination charge (R. 16-23). In conclusion the Commission states: "We are of the opinion, and so hold, that complainants have sustained the allegation of unjust discrimination under the second section of the Act. Reparation with interest from August 1, 1901, will be awarded on this account." As stated in the opinion, this conclusion is based upon the following circumstances:

The railroad owns all the capital stock of the Lehigh Valley Coal Company (R. 18). The Coal Company owns coal mines. It mined coal which it shipped to markets, including the tidewater market at Perth Amboy. The Coal Company also purchased coal which it shipped to markets. The coal so mined or purchased was shipped over the lines of the Railroad (R. 19).

Prior to 1900 the Coal Company purchased coal at sixty per cent of the tidewater price (R. 19). August 1, 1901, the price was raised from sixty per cent to sixty-five per cent of the tidewater price (R. 20). The change was made retroactive to November 1, 1900. Those who sold coal to the Coal Company from November 1, 1900, to August 1, 1901, for sixty per cent received an additional five per cent, making the purchase price from and after November 1, 1900, sixty-five per cent of the tidewater price (R. 20).

The coal was purchased at the mines. The Coal Company took title at the mines and was the shipper of the coal. There is nothing to show that any of the coal purchased by the Lehigh Valley Coal Company was ever shipped to Perth Amboy. If it was shipped to Perth Amboy the Coal Company paid the same rates as did Meeker & Company (R. 21).

In 1900 a prolonged strike reduced the Coal Company's stock of stored coal. In 1901 this stock was restored. Over one million dollars worth of coal was stored during the year ended November 1, 1901 (R. 22). During the same year the Coal Company borrowed \$1,000,000 from the Railroad.

Prior to November 1, 1900, Meeker & Company, and all other shippers, including the Coal Company, paid for transportation to Perth Amboy a rate equal to forty per cent of the tidewater price (R. 19). If the tidewater price was \$4.00, those who shipped to tidewater paid forty per cent or \$1.60 for freight. Meeker & Company bought coal at the mines and shipped it to Perth Amboy, paying prior to November 1, 1900, forty per cent of the tidewater price (R. 19).

It is stated that Meeker & Company expected, when the price paid by the Coal Company to operators was raised from sixty per cent to sixty-five per cent, that the freight rate would be reduced from forty per cent to thirty-five per cent. In fact, Mr. Meeker claims that he had an understanding with the Railroad Company whereby such a change in the rate would be made (R. 20). If there had been such an arrangement, it could not be enforced in this action. Mr. Meeker having chosen to proceed before the Commission, is limited to proof of damage resulting from discrimination against him and in favor of other shippers.

But the Railroad Company did not reduce its rates from forty to thirty-five per cent. As of August 1, 1901, it discontinued the percentage freight rate and charged the tariff rates (R. 23). In the meantime, and between November 1, 1900, and August 1, 1901, a complication had arisen from the fact that the price at tidewater became so high that at times forty per cent of the tidewater price exceeded the tariff rates (R. 20).

This was settled by returning to shippers all amounts paid in excess of tariff rates (R. 21). The rates to all shippers, including Meeker & Company, were forty per cent of the tidewater price down to August 1, 1901, with the exception that when the forty per cent exceeded the tariff rate the tariff rate was the maximum. Down to August 1, 1901, the Lehigh Valley Coal Company, and all other shippers, paid as freight forty per cent of the tidewater rate, except where the forty per cent exceeded the tariff rate, in which case the tariff rate was paid (R. 21). Where the forty per cent exceeded the tariff rate, shippers who had paid any excess over the tariff rates were refunded the excess, with the exception of Meeker & Company, to whom such excess was proffered. Meeker & Company, however, refused to accept a refund, claiming that they were entitled to a freight rate of thirty-five per cent (R. 21).

The Commission could not enforce the alleged understanding between Meeker & Company and the Railroad. It arrived at the same result, however, by the following process: It assumed that an operator who sold to the Coal Company at the mines, at sixty per cent of the tidewater price, was to all intents and purposes a shipper to tidewater at a freight rate of forty per cent (R. 19); that when the Coal Company raised its price from sixty per cent to sixty-five per cent, the Railroad was bound, as a matter of law, to reduce the freight rate from forty per cent to thirty-five per cent.

The fallacy is apparent. It might well be that all coal purchased was shipped to Buffalo. The fact that the price was controlled by the market price at tidewater did not indicate that the coal ever reached the tidewater market. Again, the Commission admits that those who shipped to tidewater did so because it was more profitable than selling to the Coal Company at the mines (R.

19). The Commission did not find a discrimination in favor of the Coal Company, it found an alleged discrimination in favor of operators who sold their coal at the mines and who did not ship a ton of coal, whose coal in fact may never have reached the tidewater market (R. 23). The Commission's conclusion is based on the fiction that these operators were shippers.

In his petition, and in his brief in this Court, petitioner alleges that the discrimination was in favor of the Coal Company (R. 5). To prove this, he relies on the conclusion of the Commission as to a discrimination in favor of operators who sold their coal to the Lehigh Valley Coal Company. The Commission found that the Coal Company paid the same rates as did Meeker & Company (R. 19, 21).

The Commission has not found, as stated at pages 25 and 26 of petitioner's brief, that on August 1, 1901, the rate was fixed at thirty-five per cent, and that the railroad company returned to all shippers except Meeker & Company the five per cent difference. The report expressly finds that all shippers were paid back the excess which they had paid over the tariff rate. The five per cent was paid back, not to shippers, but to those who had sold all their coal to the Lehigh Valley Coal Company at the mines. There was no such thing as a thirty-five per cent rate. The finding of the Commission is that the Lehigh Valley Coal Company, Meeker & Company and all other shippers paid the same rate, except that Meeker & Company were offered refunds for excesses over tariff rates and refused to accept them. The only grievance that Mr. Meeker had was, as stated, the fact that the Railroad did not keep its alleged agreement to reduce the rates upon the percentage basis. Mr. Meeker claims that there was such a percentage agreement and the railroad refused to keep it. There is no claim, however, that the



Railroad Company did readjust any rates on the percentage basis. The only percentage readjustments were readjustments made with miners who sold their coal at the mines and who were not and could not be shippers, whose coal in fact might never have come to tidewater. The entire subject of discrimination is illogically confused by the false assumption that a coal operator selling all his coal at the mines is a shipper. On the one hand it is charged, merely as a conclusion of law, that these operators were shippers and that the amounts returned to them by the Coal Company were in fact returned by the Lehigh Valley Railroad Company. On the other hand it is loosely asserted that rebates were paid to the Lehigh Valley Coal Company, which never received a rebate and which, as the Commission finds, paid the same rate as all other shippers. The statement carelessly made in the supplemental report and repeatedly urged in petitioner's brief, to the effect that the Lehigh Valley Coal Company received a rebate is not supported by and is entirely contrary to the statements contained in the original report, which report was drawn up on the erroneous theory that the operators who did not ship their coal but sold it at the mines were shippers. Such statements as those found at page 26 of petitioner's brief as: "The railroad returned to all shippers except Meeker & Company the 5% difference;" and again "When the Railroad Company subsequently reduced the rate to every one except Meeker & Company;" are not based upon any evidence in the case and are not true in fact.

It is apparent, therefore, on the face of the report, that the conclusion as to discrimination was based on a mistake of law, and for this reason it has no binding effect in this suit.

*Interstate Com. Com. v. Union Pac.*, 222 U. S.

541.

*Atchison T. & S. F. v. I. C. C.*, 188 Fed. 229.

*Interstate Com. Com. v. Louisville & Nash.  
R. R.*, 227 U. S. 88, at 92.

Furthermore, Meeker & Company could have sustained no damage on account of the alleged discrimination. It could make no difference to them whether the Coal Company paid operators \$2.40 or \$2.60. Those operators, who sold at the mines to the Coal Company, were not competitors with Meeker & Company in the tidewater market. Mr. Meeker is not complaining that he was not treated the same as the operators. He now claims he was not treated the same as the Coal Company. There is no evidence and not even a conclusion to support such claim.

As stated in the report of the Commission, Mr. Meeker's claim before the Commission was: "That the payment of the increased retroactive prices to the coal producers by the Lehigh Valley Coal Company was in fact a payment by the Lehigh Valley Railroad Company and therefore equivalent to a readjustment by the latter company of its freight rates upon the basis of the sixty-five per cent contracts on such coal as was shipped by the Lehigh Valley Coal Company during the period from November 1, 1900, to August 1, 1901" (R. 21). After discussing this contention, the Commission concluded "From the facts disclosed it is apparent that the payment of the \$231,090.19, which was ostensibly made by the Lehigh Valley Coal Company to the coal operators from which it had purchased coal during the period from November 1, 1900, to August 1, 1901, was in fact made from funds advanced as cash by the Lehigh Valley Railroad Company to the Lehigh Valley Coal Company

and was therefore the equivalent of a readjustment of the freight rates upon the basis of the sixty-five per cent contract on such coal as was purchased by the Lehigh Valley Coal Company and shipped to tidewater during the period from November 1, 1900, to August 1, 1901" (R. 23). There is no suggestion that the Lehigh Valley Coal Company received or benefited by any concession from the freight rate. There was no dispute as to the facts and no attempt to obtain from the Commission a finding that the Lehigh Valley Coal Company had received any concession or had been benefited. The issue was as to whether or not the additional payments by the Coal Company to the operators were in substance a payment by the railroad to the operators as shippers.

(b) *As to the claim based upon the alleged excessive freight charges (August 1, 1901, to July 1, 1907):*

For proof of this claim, plaintiff relies upon the opinions and orders of the Commission.

Section 16 of the Act to Regulate Commerce provides: "On the trial of such suit the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated."

Section 14 provides: "That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises, and in case damages are awarded, such report shall include the findings of fact on which the award is made."

Prior to the Hepburn amendment of June 29, 1906, the requirement was, that in all cases the report should include the findings of fact on which the conclusion of the Commission is based (Sec. 14 as amended by Act of March 2, 1889). It is significant that in amending the

section Congress retained the requirement that in reparation cases the reports shall include the findings of fact on which the award is made. A good illustration of what Congress had in mind is included in the opinion in the case of *Southern Railway Co. v. St. Louis Hay & Grain Company* (153 Fed. 728), wherein the findings of the Commission are quoted at some length. In the Meeker opinion the Commission has not pretended to meet the requirements of Section 14, above quoted (R. 23-46). The opinion is for the most part a statement of what the complainant proved, what the defendant proved, what the complainant's counsel said about the defendant's testimony, and what the defendant's counsel said about the complainant's testimony. The discussion sufficiently reveals the fact that many issues of fact were raised by the evidence before the Commission. The Commission has made no finding upon many of them. Even where the Commission has accidentally stated a fact, it has made such statement valueless by failing to find or state other necessary facts. To illustrate: Certain comparisons were made with rates on other railroads. To make such comparisons of any use, it was necessary to find that the conditions were substantially similar. No such finding was made. Again, reference is made to proof of investment value and annual return thereon. The Commission did not find the investment value, nor did it find the return. It begged the question by pointing out that the shareholders were earning a liberal return upon the par value of their capital stock (R. 45).

But plaintiff's counsel contended before the trial Court that the Commission found the rates excessive in so far as they exceeded \$1.40 for prepared sizes, \$1.30 for pea coal, and \$1.15 for buckwheat coal; that such finding is a "fact" within the meaning of Section 16; and that to prove his case, it was only necessary to show that the

Commission made this so-called finding, and to multiply the excess by the number of tons shipped. The learned trial Judge concurred in this and on that theory instructed the jury (R. 91).

*The Commission did not conclude or find, that as to the period between August 1, 1901, and July 1, 1907, the tariff rates paid by Meeker & Company were excessive or that lower rates would have been reasonable or compensatory.*

The rates paid were the tariff rates, and in the absence of a finding by the Commission to the contrary, they are the only lawful rates (*Abilene Cotton Oil case*, 204 U. S. 426). The Commission has repeatedly held that it will not grant reparation unless it can affirm with confidence that the rate charged in the past was unreasonable when paid; and that the fact that a rate is unreasonable at present raises no presumption that it was unreasonable in the past (*Farmers Warehouse Co. v. L. & N. R. R. Co.*, XII., I. C. R. 457).

Therefore, the plaintiff to recover must prove that the rates charged were excessive, and that the lower rates would have been reasonable and compensatory. The Commission has made no such finding. At the conclusion of the opinion of June 8, 1911, the Commission states: "We are of opinion and so find, that defendant's rates for the transportation of coal from the Wyoming region to Perth Amboy, \* \* \* are unreasonable so far as they exceed \$1.40 on prepared sizes, \$1.30 on pea coal, and \$1.15 on buckwheat." As to past rates, the Commission states: "We are further of opinion that reparation should be awarded upon basis of the rates herein found to be reasonable upon all shipments of coal by complainants from the Wyoming region to Perth Amboy since August 1, 1901. The amount of reparation which

should be awarded under our finding in this case cannot be ascertained from the exhibits now on file, and such further proceeding will be had as may be necessary to determine the amount of money due to complainants" (R. 47). This is not a finding to the effect that from August 1, 1901, to July 1, 1907, the tariff rates were excessive and the lower rates reasonable and compensatory.

The opinion of June 8, 1911, did not purport to be a report in a reparation case. The report did not award damages. Naturally, therefore, it did not contain the findings of fact on which an award could be made. Such were left for the future or reparation report. This report was issued nearly a year later, on May 7, 1912. In it the Commission states: "In our original report we found \* \* \* that the rates in effect from August 1, 1901, to July 17, 1907, were unreasonable to the extent that they exceeded rates of \$1.40 per gross ton on prepared sizes, \$1.30 on pea and \$1.15 on buckwheat" (R. 11). The original report contained no such finding. The defendant objected to the admission of the supplemental report on the ground that it contained this misstatement of fact, the original report being the best evidence of the findings therein contained (R. 68). It is clear that the supplemental report was written under a serious misapprehension as to the meaning and effect of the original opinion. (Another illustration of this is the statement in the supplemental report to the effect that the Commission found in the original report that the Railroad charged Meeker & Company, from November, 1900, to August 1, 1901, rates which were discriminatory because they exceeded the rates charged the Lehigh Valley Coal Company (R. 11), the Commission having clearly stated in its original opinion that

the rates charged the Lehigh Valley Coal Company were the same as those charged Meeker & Company) (R. 21).

In the reports and orders in evidence there is no finding as to the reasonableness of rates during that period (1901-1907). There is only the inference arising from the fact that the Commission awarded the reparation.

A reparation report is not effective unless it contains findings of the facts on which the award is based. Such is the requirement of Section 14. In view of the requirements of Section 14, can it be contended that findings of fact, although omitted from the report, are to be inferred from the mere fact that an award is made?

As stated by the Commerce Court: "The plain question presented in every application for reparation is whether the rate which has been charged is reasonable or unreasonable; and, if unreasonable, the extent to which it is so. On this both the shipper and the carrier are entitled to an explicit finding; this, if found in favor of the shipper; being the foundation of his cause of action. *Texas & Pacific R. R. v. Abilene Cotton Oil Co.*, 204 U. S., 437." *Russe & Burgess v. I. C. C.* (Commerce Court, 1912), 193 Fed. 678, at 680.

*If it should be held that the Commission has found that the rates charged between August 1, 1901, and July 1, 1907, were excessive, and that the lower rates were reasonable and compensatory, such conclusions are not admissible in evidence as facts within the meaning of Section 16 of the Act.*

Section 16 provides "That on the trial of such suit the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated." This section must be read in connection with Section 14, which



requires that the reports contain "the findings of fact on which the award is made."

Section 14 of the Act of 1887, as amended by the Act of March 2, 1889, read:

"That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto which shall [include the findings of fact upon which the conclusions of the Commission are based, together with its recommendation as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured; and such findings so made shall thereafter, in all judicial proceedings, be deemed *prima facie* evidence as to each and every fact found]."

By the Act of 1906 the part in brackets was stricken out and in place thereof the following was inserted:

"state the conclusions of the Commission, together with its decision, order or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made."

Section 16 of the Act of 1887 said:

"The findings of fact of said Commission as set forth in its report shall be *prima facie* evidence of the matters therein stated."

This was changed by the Act of 1906 to read:

"The findings and order of the Commission shall be *prima facie* evidence of the facts therein stated."

Prior to 1906 a rule of the Commission read as follows:

"XIII. Upon the final submission of the case to the Commission, either party may submit proposed findings of fact for the consideration of the Commission, which findings must embrace only the material facts of the case supposed to be established by the testimony."

The Commission's opinion discloses that there were a large number of material facts upon which voluminous testimony was given. The fact that the period embraced covers many years, made necessary the settling of many material facts in the case. Under the permission of sections 14 and 16, it was possible for the complainant to submit proposed findings and to obtain from the Commission a statement of all the material facts established by the testimony. Such facts might or might not have warranted a jury in reaching the conclusion stated by the Commission. On the other hand, the mere statement that the Commission is of the opinion and so finds, that certain rates are unreasonable is proof only that the Commission found the rates unreasonable. The general statement of the Commission as to its opinion upon innumerable freight charges covering long periods of time, has been placed before the jury as conclusive of defendant's guilt, in the absence of controlling evidence to the contrary. The same misapprehension as to the meaning of Section 16, led the Trial Court to admit the Commission's conclusions as to damages, as well as the conclusions as to discrimination and unreasonableness. The Trial Court assumed all the conclusions to be binding on the jury in the absence of controlling evidence to the contrary. The error in each instance was the same, namely, a failure to distinguish between facts stated, and conclusions, or between the awards and the facts on which the award was made. The error is discussed at length under the Second Point of this brief which relates to the question of damages, and will not be repeated here.

If, however, it should be held proper that the jury pass upon the issues as to reasonableness, we submit that, for the reasons stated above and more fully discussed under the Second Point, such issues have not been properly proved or submitted to the jury in this case.

**SECOND POINT.**

**Plaintiff has failed to prove by competent evidence that Meeker & Company sustained damage. The measure of damages, if any, should be the loss to Meeker & Company as the result of the alleged discrimination or the alleged unreasonable rate. It does not follow from the conclusion of the Commission that an established rate is unreasonable in so far as it exceeds a stated amount, that a shipper who paid the established rate has been damaged, or that his damage, if any, should be measured by the difference between the two amounts.**

Defendant excepted to the Court's charge to the effect that the Commission had found Meeker & Company damaged (R. 92). Also to the charge that the reports stated sufficient evidence to sustain recovery (R. 93). The defendant asked the Court to charge that there was no evidence that Meeker & Company was damaged (R. 96). Due exceptions were taken and the respective rulings of the Court were assigned as error (R. 107). Since counsel for petitioner has said in his brief (pages 50 and 51) that this point was not raised below, we call especial attention to defendant's request to charge that "There is no evidence showing or tending to show that the petitioner was in any way damaged, or could have been damaged by the alleged acts of discrimination \* \* \*" (R. 96). And again "There is no competent evidence either by way of findings or statements or any other evidence in this case that the petitioner was in any way damaged by the alleged imposition of unreasonable rates \* \* \*" (R. 96). The same points are raised by assignments of error (R. 107).

The decision of the Supreme Court in *Pennsylvania R. R. v. International Coal Company*, 230 U. S., 184, is controlling. The International Coal Mining Company sued the Pennsylvania Railroad Company for damages based on an alleged violation of Section 2 of the Interstate Commerce Act. It was charged that the railroad paid other coal shippers rebates of from five to thirty-five cents per ton. The facts are concisely stated in the opinion at page 195, as follows: "On that date (April 1, 1899) the carrier increased the rates and discontinued the payment of rebates, except that for the purpose of saving shippers against loss, it made a difference between what is called 'free coal' and 'contract coal.' Under this practice where coal had been sold for future delivery, the carrier collected the published tariff rate, but rebated the difference between it and the lower rate in force when the contract of sale had been made. When, after April 1, 1899, the plaintiff applied for allowances, its demand was rejected, with the statement that all its contract coal would be protected in the same manner as others in the Clearfield District. The International Coal Company had no overlapping or unfulfilled contracts and claiming that it did not learn of the practice to protect such contracts until, in 1904, it brought this suit. It proved that between April 1, 1899, and April 1, 1901, it had shipped about 40,000 tons on which it had paid the full tariff rate, while other companies shipping from and to the same places at the same time had been allowed on their contract coal rebates of 5, 10, 15, 25 or 35 cents per ton. Plaintiff recovered a verdict."

The judgment was reversed and a new trial granted on the ground that plaintiff had failed to prove that he had suffered pecuniary loss as a result of the discrimination.

The following extracts from the opinion are directly applicable to the present case:

"There were many provisions in the statute for imprisonment and fines. On the civil side the Act provided for compensation—not punishment. Though the Act has been held to be in many respects highly penal, yet there was no fixed measure of damage in favor of the plaintiff. But, as said in *Parsons v. Chicago & N. W. Railway*, 167 U. S., 447, 460, construing this section (8): 'before any party can recover under the Act he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury.' Congress had not then and has not since given any indication of an intent that persons not injured might, nevertheless, recover what though called damages would really be a penalty, in addition to the penalty payable to the Government" (p. 200). \* \* \* "For if the plaintiff here had been required to pay more than the tariff rate it could have recovered the excess, not as damages, but as overcharge, and while one count of the complaint asserted a claim of this nature, the proof did not justify a verdict thereon, for the plaintiff admitted that it had only paid the lawful rates named in the tariff. Of course, no part of such payment of lawful rates can be treated as an overcharge or as an extortion" (p. 202). \* \* \* "The measure of damages was the pecuniary loss inflicted on the plaintiff as the result of the rebate paid. Those damages might be the same as the rebate, or less than the rebate, or many times greater than the rebate; but unless they were proved they could not be recovered. Whatever they were they could be recovered, because Sec. 8 expressly declares that wherever the carrier did an act prohibited or failed to do an act required, it should be 'liable to the person injured thereby for the full amount of damages sustained in conse-

quence of such violation \* \* \* together with reasonable attorney's fees' " (p. 203). \* \* \* "There was no proof of injury—no proof of decrease in business, loss of profits, expense incurred or damage of any sort suffered—the plaintiff claiming that, as matter of law, the damages should be assessed to it on the basis of giving to it the same rate, on all its tonnage, that had been allowed on any contract coal shipped, on the same dates, whether such tonnage was great or small" (p. 203). \* \* \* "The statute gives a right of action for *damages* to the *injured* party, and by the use of these legal terms clearly indicated that the damages recoverable were those known to the law and intended as compensation for the injury sustained. It is elementary that in a suit at law both the fact and the amount of the damage must be proved." \* \* \* "But the plaintiff may have sold at the usual profit all or a part of its 40,000 tons at the regular market price, the purchaser, on his own account, paying freight to the point of delivery. In that event not the shipper but the purchaser, who paid the freight, would have been the person injured, if any damage resulted from giving rebates. To say that seller and buyer, shipper and consignee, could both recover would mean that damages had been awarded to two where only one had suffered" (p. 204). \* \* \* "The limitation of liability to the persons damaged and to an amount equal to the injury suffered is not out of consideration for the carrier who has violated the statute. On the contrary, the Act imposes heavy penalties, independent of the amount of rebate paid, and as each shipment constitutes a separate offense, the law in its measure of fine and punishment is a terror to evil doers. But for the public wrong and for the interference with the equal current of commerce these penalties or fines were made payable to the Government.

If by the same act a private injury was inflicted a private right of action was given. But the public wrong did not necessarily cause private damage, and when it did, the pecuniary loss varied with the character of the property, the circumstances of the shipment and the state of the market, so that instead of giving the shipper the right to recover a penalty fixed in amount or measure, the statute made the guilty carrier liable for the full amount of damages sustained—whatever they might be and whether greater or less than the rate of rebate paid” (p. 206).

Section 8 of the Act provides that in case any common carrier shall violate any of the provisions of the Act, such carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation. In this section, and this section only, is to be found the basis of the right to recover damages in civil suits for violations of the Commerce Act. The words “any act, matter or thing prohibited or declared to be unlawful” include rebates, other discriminations and the imposition of an unreasonable charge. In the same manner the measure of damage specified in Section 8 as “the full amount of damages sustained” is prescribed as the measure of damage in all cases and no distinction is made between cases involving a discrimination or rebate and cases involving an overcharge. For this reason, as clearly pointed out in the opinions below, the doctrine of the *International Coal Company case* is directly applicable in this case. We quote from the opinion below:

“It hardly needs to be pointed out, as we did in the Clark case, that the *ratio decidendi* of the Supreme Court does not differ from that applicable to the present case. The Supreme Court also distinctly decides that,



in the absence of proof of actual damage to that extent, the amount of rebate charged and proved to have been made by defendant, cannot be recovered as damages, and that it can never be made the measure of the damage to which plaintiff is entitled. No more in this case can the difference between what is found by the Commission to be the unreasonable tariff rate and that fixed as a reasonable one, be made the measure of the damage that the plaintiff has suffered. As pecuniary damages are neither alleged in the pleadings nor proved in the trial, the plaintiff made out no case upon which recovery of damages could be had" (R. 148).

To the argument, that at common law the measure of damage was the amount of the overcharge, the Court, after referring to the opinion in the *Abilene Cotton Oil Case*, stated:

"We think this whole opinion tends to emphasize the distinction between the common law rights of action referred to, and the right of action created and defined by the act. A situation where the rates paid were the rates fixed by the act, as the only legal rates that could be demanded or paid, even though those rates are declared afterward by the Commission, in the performance of its administrative function, to be unreasonable, differs essentially from a situation where an *illegal* rate is, in the first instance, coerced or *extorted* by the carrier. The tariff rate paid by the shipper was the legal rate, any departure from which is made by the statute a misdemeanor and punishable by fine. There is consequently no 'overcharge' to be recovered as such, as in the cases cited at common law, and no coercion except that of the law. It is obvious that, even though the statute were silent as to the measure of damage applicable to the first situation, that measure could not justly be the same as in the second" (R. 152). \* \* \* "The learned

counsel for the defendant in error seems to argue that this statute creates a *general* liability, independent of any relativity, limitation or qualification, as soon as a violation of the act is shown. That this is not so, is apparent. It is not a *general* liability that is imposed by the act, but a particular liability to the person injured 'for the full amount of damages sustained in consequence of any violation of the provisions of the act.' The liability thus defined is the only civil liability anywhere imposed, and no other or different civil liability can attach itself to *any* violation of the act. The liability thus imposed being the same for all violations of the law, without exception, that liability, as defined by the statute, is to the 'person or persons injured for the full amount of damages sustained in consequence of *any* such violation of the provisions of this act.' We cannot avoid the plain and exigent meaning of this language. It is impossible, in view of it, to attribute to Congress an intention to apply it to only a portion of the offenses against the act" (R. 153).

Again, the Court below, after calling attention to the fact that Section 8 puts all shippers prosecuting suits for damages on the same footing, stated:

"In like manner it follows that the measure of damages sustained by a shipper in consequence of any violation of the act, must be the same in all cases. We find no authority in the act itself, or in the decisions of the Supreme Court, for applying a different measure of damage in the case of any violation of the act, than that established by the eighth section, viz., 'the full amount of damages sustained' by reason thereof. To hold that, in one case actual damage must be proved, and in the other not, introduces confusion in the administration of the law, for which the only justification must be the express and mandatory requirement of the stat-

ute or the express and controlling decision of the Supreme Court (R. 155). \* \* \* The language of the eighth section makes the measure of damage therein prescribed applicable to *every* violation of the act. Nor has the Supreme Court in any case decided otherwise. Its reasoning as to the measure of damages established by the eighth section, is also applicable to *every* violation of the act,—to one that depends for its illegality upon a finding of the commission, as well as to one where such finding is unnecessary. The argument to the contrary is largely technical, and tends to make a mockery of the right to a jury trial and to defeat the just purposes of the act in that respect" (R. 159).

As to Mr. Meeker's discrimination claim, no argument is needed to show that the doctrine of the *International Coal Company Case* is applicable. Both cases involved alleged rebates, and in both cases it was assumed, as a matter of law, that the damage equalled the amount of the alleged rebate. Counsel endeavors to avoid the force of the *International Coal Company* decision by suggesting that the report of the Commission establishes as a *prima facie* fact that Mr. Meeker was damaged in the amount of the alleged rebate. His contention is not sound.

In the first place, what counsel refers to as a fact established *prima facie* by the report, is but a conclusion by the Commission, which conclusion, as we have pointed out under the foregoing point, is not evidence and should not have been received as evidence in this case, *prima facie* or otherwise. In referring to such conclusion as evidence counsel merely argues in a circle and thus tries to avoid, without answering, the truth clearly stated in the opinions below, that this conclusion on the part of the Commission may not be consid-

ered as proof of the defendant's liability, *prima facie* or otherwise. The conclusion which counsel points to as *prima facie* is a conclusion of law. The Commission expressly and avowedly awarded damages to the plaintiff on the discrimination claim on the theory that the amount of the rebate constituted the measure of damage.

Counsel suggests that the Railroad has not proved that the Commission assessed the damages as a matter of law and without proof of actual damage. His contention is that on the record in this case it must be assumed that the Commission took evidence as to the plaintiff's actual damage and found the amount of the damage, not as a conclusion of law, but as a fact based on proper evidence. This suggestion is the best possible illustration of the vice of the contention that such conclusions of the Commission should be received as evidence of facts. It was to avoid just such ingenuity and misunderstanding that Congress specified in Section 14 that in case damages are awarded the report shall include findings of fact on which the award is made.

Again, counsel's ingenuous suggestion puts him in the position of one having invoked the jurisdiction of this Court on the ground that important questions of law were to be decided, and then arguing that the questions of law are not applicable because of a defect in defendant's proof. His ground for asking the unusual relief granted upon this writ of *certiorari* was that the legal questions involved were new and of great importance and that the plaintiff should be relieved of the expense and delay incident to a new trial of the case, at which the rulings of the Circuit Court of Appeals would be binding, thus necessitating at the end an appeal to this Court from the final judgment. Having been admitted to this Court on this ground while a new trial is pending, he seeks to deprive the defendant

of the new trial already granted, on the ground of failure of proof at the first trial. As the writ was granted solely in furtherance of justice, it would seem unfair to attempt to make the judgment against the defendant final upon a technical contention as to lack of proof at the first trial. Moreover, the Circuit Court of Appeals, upon considering all the facts in the case, determined that the Commission awarded the damages, not upon material and proper evidence, but merely as a conclusion of law. Thus, as to the excessive charge claim, the Court below states: "The difference between the two (rates) was expressly and avowedly awarded as damages to the plaintiff" (R. 158). It would seem in any event that the Circuit Court of Appeals' determination as to the facts would be taken as conclusive in this Court and that its determination to grant a new trial should not be overruled unless the rules of law applicable to this case are such as to make a new trial useless. The question, therefore, before this Court under this point is whether or not the rule of this Court in the *International Coal Company Case* is applicable to the Meeker cases. If so, a new trial should be had, governed by those rules.

As a matter of fact, it appears clearly from the reports of the Commission that the Commission granted damages at the difference between the two rates and as a matter of law, and that it had before it no material evidence as to plaintiff's damage. At the close of its discussion of the discrimination case, the Commission states: "We are of the opinion and so hold, that complainants have sustained the allegation of unjust discrimination \* \* \*. Reparation with interest from August 1, 1901, will be awarded on this account" (R. 23). No reference is there made directly or indirectly to the allegation of damage. At the close of the first report the Commis-

sion said: "We are further of the opinion that reparation should be awarded upon basis of the rates herein found to be reasonable upon all shipments of coal by complainants from the Wyoming region to Perth Amboy since August 1, 1901. The amount of reparation which should be awarded under our finding in this case cannot be ascertained from the exhibits now on file and such further proceeding will be had as may be necessary to determine the amount of money due complainants" (R. 47). The words "the rates herein found to be reasonable" refer back to the preceding paragraph (R. 47) in which the lower rates are stated. The Commission, has, therefore, in its report clearly stated that it awarded the reparation not on the basis of the complainant's damages, but upon the basis of the difference between the rates charged and the "rates herein found to be reasonable." As to the subsequent hearing, the report states: "A further hearing has been held and complainant has presented exhibits showing the total number of tons of each variety of coal shipped and the amount of reparation due on such shipments" (R. 11). The same schedules, which, as stated in the second report of the Commission, constituted the evidence at the further hearing, were placed in evidence at the trial. The schedules were produced at the trial by Mr. Meeker and were admitted by Mr. Meeker and his counsel to be exactly the same as those offered in evidence before the Commission (R. 58, 76). The schedules were offered in evidence as Defendant's Exhibits A and B (R. 77 and 80). They are printed at pages 87, 88 and the following pasters marked "143-192." These schedules show the tons shipped, the amounts paid, the amount which would have been paid in the discrimination claim upon the so-called Sixty-five Per Cent basis, and the amounts which would have been paid under the exces-

sive charge claim on the basis of the so-called reduced rates. The only other evidence contained in the schedules, if it may be called evidence, is an arithmetical computation. These are the schedules which the Commission refers to in its second report as "The exhibits showing the total number of tons of each variety of coal shipped and the amount of reparation due on such shipments" (R. 11). We therefore have on the face of the reports a statement to the effect that the evidence of damage before the Commission constituted the arithmetical computations contained in these schedules and nothing more. The Court below was certainly justified in finding from this evidence that the Commission proceeded arbitrarily and without any legal evidence of damage under the mistaken view that "the fact and amount of pecuniary loss is a matter of law" (230 U. S. 204). The result of such a mistaken action on the part of the Commission has no legal effect, either as an award, a conclusion, or a finding. (*I. C. C. v. L. & N. R. R. Co.*, 227 U. S. 88).

It is claimed in the brief for the petitioner that the second report of the Commission states that the railroad conceded the accuracy of the reparation due (Petitioner's Brief, pages 19 and 50). This is not so. The contention is based upon a mere play upon words. The sentence relied upon is as follows (We quote from the supplemental report of the Commission. R. 11): "A further hearing has been held and complainant has presented exhibits showing the total number of tons of each variety of coal shipped and the amount of reparation due on such shipments. These exhibits have been examined by defendant and admitted to be correct." By reference to these exhibits (R. 87, 88 and following pasters marked "143-192") it will be seen that the concession referred only to shipments, the freight paid and the arithmetical



computations thereon. There is no concession that any reparation was due. The words in the supplemental report "And the amount of reparation due on such shipments" are merely the conclusion of the Commission to the effect that the excess of the rates charged over the rates found to be reasonable constitutes "the amount of reparation due." The Commission erroneously assumed, as a matter of law, that the excess was the amount of reparation due. But to make it perfectly clear that the statement as to "reparation due" is a conclusion of the Commission and not a concession by the Railroad, Mr. Meeker was asked to state just what the Railroad did admit. He testified as follows: "Q. When you say these sheets were approved by the Lehigh Valley, you mean nothing more, do you, than they were turned over to the Lehigh Valley Accounting Department for the purpose of checking up the figures in them? A. That is all" (R. 77, see also R. 74-78).

The Commission has always granted reparation upon the basis of just such examples in subtraction. The Commission has frankly established this rule of damage as a matter of law and entirely without reference to the damage sustained. *Cattle Raisers' Association v. Ft. Worth & D. C. Ry.* (VII., I. C. R. 513, 553). In cases involving comparatively small amounts there may have been no material advantage in contesting this erroneous conclusion of the Commission, but where the complainant, as in this case, has with remarkable astuteness stored up, through a long series of years, a claim for over a hundred thousand dollars while his competitors were sleeping on their rights, the question assumes great importance and the time has come to ask whether a shipper who has not been injured may nevertheless recover, under the guise of damages, an enormous preference. As

stated by this Court in the *International Coal Company case*, "Congress had not then and has not since given any indication of an intent that persons not injured might, nevertheless, recover what, though called damages would really be a penalty, in addition to the penalty payable to the Government" (230 U. S. 194 at 200).

The measure of damage applied by the Commission, for which petitioner's counsel contends, is but a rule of convenience based, possibly by analogy, upon the rule in extortion cases before the Act was passed. The rule, however, when applied to measure damages for a violation of the Act, is anomalous and in every way inconsistent with the true purpose of the Act.

In the first place, as clearly stated in the opinion below, the Commission's rule of damages selects a particular kind of violation of the Act and applies to it a special rule of damage, whereas the Act itself (section 8) has but one measure of damage for all, namely, "the full amount of damages sustained."

In the second place, the main purpose of the Act, namely, uniformity, prevents the application of any such rule of damages. Conceding that a carrier has filed an unreasonable rate which by law it must charge so long as it remains established, the law compels the payment of that same rate by each and every shipper. The rate becomes the law for each similar transaction and is automatically incorporated in all of the commercial transactions affected by it. The shipper does not lose the excess as he would lose it had an excessive rate been extorted from him individually by an act of the carrier. It is fair to assume that the burden has fallen upon the consumer and that the shipper has made his percentage of profit out of the excess in the freight charge just as he has made his percentage of profit out of every other transaction going to make up the final cost to the con-

sumer. The Commerce Act protects the shipper from the loss which he formerly would have sustained in paying an extortionate rate. In fact, the main purpose of the Act was to save the shippers from just such losses. The Act, by maintaining strict uniformity, enables the shipper, as it were, to pass along his loss, if any, to the consumer. The public at large, including shippers and consumers, are protected from the payment of excessive rates both by the power of the Commission to fix rates for the future and by the penalties prescribed in Section 10 of the Act. No intent is found in the Act to further penalize the carrier by way of compelling it to restore arbitrary sums to shippers who have sustained no damage.

The Commission has not found that Meeker & Co. did not receive from their customers the entire freight charge plus a percentage of profit on the freight charge, including the excess charge. If Meeker & Company's price was the price at the mines plus the freight rate, then Meeker & Company surely have not been damaged. Even if the price at tidewater were a fixed price, which included the freight charge, that price must have been made with reference to the amount of the freight charge. The requirements of the Act, that the freight charged must be uniform, made it certain that any tidewater price fixed must include the entire freight charge. These are but circumstances controlling on the question of Mr. Meeker's damages, all of which were entirely ignored by the Commission; with the result that the report states no facts upon which a conclusion can be based to the effect that Meeker & Company sustained damage, or the amount of such damage, if any.

Finally, if as a matter of law, the measure of damage in reparation cases is to be the difference between two rates established by the Commission, then the provisions

of the Act by which the defendant's right of trial by jury is so carefully preserved are nullified. There is nothing left for a jury to decide. The evidence which Congress said must be *prima facie*, becomes conclusive.

It is not necessary to repeat here the logical discussion of the history of the reparation features of the Commerce Act contained in the opinions of the learned Court below both in this case and in *Lehigh Valley v. Clark* (207 Fed. 717). (The latter opinion is printed as an appendix at the end of this brief.) That Court points out with great clearness that since 1889 it has never become the purpose of Congress to make the conclusions of the Commission as to defendant's liability, evidence in a suit for damages; but that, on the contrary, the successive amendments have clearly preserved the intention that all of the material issues in a damage case should be tried by an unprejudiced jury. Nothing can be more clear than that litigants have been warned with painstaking repetition that the use of the Commission's orders in a reparation case will be confined to the reading before the jury of specific relevant facts stated in the reports. The opinion below is in full accord with other judicial interpretations of authority and long standing.

In *Interstate Com. Com. v. L. & N. R. R. Co.* (73 Fed., 409, at 414) District Judge Clark stated, as to the requirements of the reports of the Commission:

"For the Commission's investigation and opinion to have this intended value, however, it should, in fact, conform to the purpose of Congress in requiring such proceedings. It is not sufficient, therefore, in a report of its findings of fact and conclusions, to do so in such general way as not to disclose its views upon particular phases of the evidence, or its conclusions of law upon facts found with reference to the particular issues in

the case. Stated in another form, it is not sufficient for the report to be made up of mere conclusions. Its opinion or report should show what the issues in the case are, and what facts it finds in regard to such issues. The report should make suitable reference to the evidence adduced in regard to any particular question, where there is a conflict in the proof, showing how the Commission settles the disputed fact; or, if the evidence in regard to any issue is undisputed, state that fact. In other words, the report should give the parties to be affected, as well as the Court, in any judicial proceeding afterwards instituted, definite and distinct information as to what was found as facts, and the Commission's opinion thereof, such as would be necessary to make a judicial opinion sufficient and satisfactory for the purpose of ordinary litigation."

In *Cincinnati, New Orleans & Texas Pacific Ry. v. Interstate Com. Com.* (162 U. S. 184, at 196) this Court stated: "The reasonableness of the rate, in a given case, depends on the facts, and the function of the Commission is to consider these facts and give them their proper weight."

In *Darnell-Taenzler Lumber Co. v. Southern Pacific Co.* (190 Fed. 659) District Judge McCall stated: "If the conclusions or orders of the Commission were by the Act made prima facie evidence of the liability of the defendant, then the declaration is sufficient. But such does not seem to be the case. \* \* \* If the Congress intended that the order making the award should be taken as prima facie evidence of the liability of the carrier, then it would seem that it did a useless thing in requiring the Commission by the terms of the Act to make findings of facts in cases wherein awards for damages are allowed. \* \* \* If the order of the Commission making an award is given the force of a probative fact,

and taken as prima facie evidence of the liability of the carrier, then (as in the case before the Court) a condition might arise where, in the opinion of the Court, the order of the Commission is not warranted by any facts found and reported by it upon which it is presumed the order of award is predicated, and the Court would be unable to pronounce judgment for the plaintiff, even if no defence was interposed. In such a case the Court would be at a loss to know whether it should be controlled by the facts reported or the order made by the Commission in pronouncing its judgment" (p. 662).

The case of *Western New York & P. R. Co. v. Penn. Refining Co.* (137 Fed. 343) involved a charge of discrimination in favor of shippers of oil in tank cars and against shippers of oil in barrels. The point in question arose in connection with an assignment of error to the admission of the following paragraph from the report of the Commission as evidence before the jury: "After full investigation and mature consideration \* \* \* we hold, that where both modes of transportation are employed by the carrier and the use of one, the tank car, is not open to shippers impartially but is practically limited to one class of shippers, the charge for the barrel package in barrel shipments in the absence of a corresponding charge on tank shipments, resulting in a greater cost of transportation to the shippers in barrels on like quantities of oil between like points of shipment and destination than to the tank shipper, is an unjust discrimination subjecting the barrel shipper to an unreasonable disadvantage and giving the tank shipper an undue advantage, and that no circumstances and conditions have been disclosed by the evidence in these cases authorizing such discrimination by any of the defendant carriers" (p. 348).

The Court held that the admission of that statement as evidence was error, stating: "Taken as a whole it is argumentative, and when pronounced and admitted by the Court as 'a finding of fact,' was calculated unduly to influence and perchance to mislead the jury to the prejudice of the defendants by causing the belief, possibly on insufficient grounds, that the charge for the barrel package in barrel shipments of oil complained of was not reasonable and just as required by the Interstate Commerce Act. The subject to which it related was of vital importance in the case. Whether the charge for the barrel package was reasonable and just, or unjust and excessive, was a question to be decided by the jury on proper evidence, and not on mere arguments and legal conclusions of the Commission" (p. 348).

And at page 350:

"In proceedings at law under Section 16, as amended, for the enforcement of an order or requirement of the Commission, the parties are entitled to an impartial trial by jury, so conducted as to accord to them in full measure the enjoyment of their constitutional right. The procedure contemplated by the Act and, unless waived, required by the Constitution, is jury trial, accompanied with the usual safeguards furnished by a proper application of the principles of evidence and the proper submission of the case to the jury."

In Section 16, Congress has provided that the Commission shall state the facts upon consideration of which it arrived at its conclusion. Such statement may go before the jury as *prima facie* evidence of those facts. Upon those facts the jury, unembarrassed by binding instructions as to the weight to be given to the conclusions of the Commission, should be allowed, after due consideration, to arrive at an independent conclusion.



The jury, upon consideration of the facts might well arrive at an entirely different conclusion. In the last analysis, the jury, and the jury only, can decide whether or not the property of the railroad shall be taken from defendant and given to the plaintiff, and if so to what extent. The Act has provided that the jury shall have access to the facts upon which the Commission based its award. If we concede that Congress has the power to so change the rules of evidence, it is nevertheless clear that if in place of the facts which the Commission considered, the conclusions based on such consideration are made *prima facie* evidence, then there has been substituted for evidence of fact a prejudicial conclusion. Congress, in that case, has not changed the rules of evidence; but has attempted to forestall a fair consideration by the jury of the merits of the case.

### THIRD POINT.

**The Commission's opinions contain statements, arguments and conclusions which the act does not purport to make admissible as *prima facie* evidence in a suit for damages. In admitting the reports in evidence the Trial Court prejudiced the rights of defendant, making it thereafter impossible for the defendant to place before the jury its side of the case unembarrassed by the incompetent and misleading statements in the opinions.**

The defendant objected to the admission of the opinions on this ground. The objection was overruled and exception taken (R. 64, 65, 70). Their admission was assigned as error (R. 102). The only theory upon

which the reports could have been admitted as a whole is that they contained "findings of fact" made by the Commission. We quote two illustrations of the so-called *prima facie* evidence thus introduced:

"It appears that prior to 1900 various anthracite coal carrying railroads in Pennsylvania, in their endeavor to control the output and sale of anthracite coal, had formed other and distinct corporate organizations \* \* \*" (R. 18).

"L. S. Smith \* \* \* made up a statement of cost to move one train of coal from Drifton \* \* \* to Perth Amboy \* \* \* and the return of empty cars, which statement is filed as Complainant's Exhibit No. 1. The total cost per ton shown by said exhibit is 76.54 cents" (R. 26, 27).

There is no possible excuse for placing before the jury what Mr. Smith said about the cost of carrying coal to tidewater, or what the Commission parenthetically stated to be the reason for organizing the various anthracite coal companies. What may have been the purpose of offering the whole report does not appear. The result was to fix in the jurors' minds two (among many) prejudicial hearsay statements; first, that the defendant was endeavoring with other anthracite roads to control the output and sale of coal, and second, that Mr. Smith said it cost 76½ cents to carry coal to tide. Two bugaboos were dangled before the jurors. The defendant was in the "Coal Trust." The defendant was charging \$1.55 for transportation that cost it but 76½ cents—100 per cent profit.

It is not enough to urge that these and many other hearsay statements dumped wholesale into the case before the jury could not have prejudiced the defendant because the case should have been taken from the jury and a verdict directed. Petitioner's counsel allowed the case to

go to the jury, confident of the result and desirous of obtaining any additional advantage which might result from that course (R. 92). Although it was an empty form, the jury did return a verdict (R. 99). Furthermore, it was the duty of the jury, even under the practice adopted by the trial Court and petitioner's counsel, to pass upon the evidential value of the "facts" submitted to it. Section 16 makes the facts stated in the report *prima facie* evidence. Such evidence the jury could value as it saw fit, or could deem of no value. But to do this the jury would have been compelled (as stated in the opinion below) "to examine that voluminous report to discover for themselves whether it contained any findings of fact bearing upon the question as to what actual damage had been suffered by the plaintiff, by reason of the unlawful conduct of the defendant" (R. 145).

The trial Judge instructed the jury with reference to the reports as a whole that "the suit is on the Report of the finding of the Interstate Commerce Commission and their finding is made *prima facie* evidence of the correctness of the amount the plaintiff is entitled to recover" (R. 91). And again, "There is no evidence in this case but the plaintiff's evidence, the Report of the Commission, the fact that it is not paid, and the other collateral evidence which was in support, or which was part of the history of the case, as to how it got here. So that the only evidence before you is the *prima facie* evidence of these claims. \* \* \* (R. 92). "They (the reports and order) state the conclusions as required by the Act, and they state the findings of fact upon which the award is based, and they make that award in the sums that I have mentioned, upon sufficient findings of fact to sustain this suit" (R. 90).

In so conducting the case the Trial Court refused to follow the ruling of the Court of Appeals of the same

circuit in *Western New York & P. R. Co. v. Penn Refining Company* (137 Fed. 343). That case involved a claim for reparation which was awarded by the Commission because of an alleged discrimination in favor of shippers of oil in tank cars and against shippers of oil in barrels. The Trial Court admitted in evidence the reports of the Commission, which contained the arguments and conclusions of the Commission. The Court of Appeals held that the admission of these reports as a whole, was error, stating at page 351: "While not expressing the opinion that findings of fact even when mixed with incompetent matter should in all cases be excluded, we hold that, if the same be received, the Court should clearly separate and distinguish before the jury the findings of fact from the incompetent matter, and direct that the latter be wholly disregarded. Unless this course be pursued the parties are deprived at least in part of the benefits or safeguards intended to be secured to them under the constitutional guarantee of trial by jury. In omitting in the present instance to follow such method we think there was error and that the assignments must be sustained."

One of the conclusions contained in the report and complained of in the *Penn Refining Case* was the Commission's conclusion as to the existence of the discrimination. Such conclusion may be compared with the conclusion of the Commission that payments by the Lehigh Valley Coal Company to coal operators were in fact payments by the Lehigh Valley Railroad to shippers who were competitors of Meeker & Company (R. 23). As to such a conclusion, the Court of Appeals stated (137 Fed. 348): "Taken as a whole, it is argumentative, and when pronounced and admitted by the Court as 'a finding of fact,' was calculated unduly to influence and perchance to mislead the jury to the prejudice of the

defendants by causing the belief, possibly on insufficient grounds, that the charge for the barrel package in barrel shipments of oil complained of was not reasonable and just as required by the Interstate Commerce Act."

And at page 350: "The act does not make the mere legal opinions, arguments or reasons of the Commission *prima facie* evidence or evidence of any kind in any judicial proceeding. It was not the intent of the act to introduce into proceedings for the recovery of pecuniary reparation awarded by the Commission elements of uncertainty, complexity or confusion, foreign to any orderly system of judicial procedure."

There was not the slightest need or justification for placing the Meeker report as a whole before the jury. Even had the Court instructed the jury to disregard certain portions of the report the prejudice to defendant could not be avoided. In fact, the very act of pointing out the matter to be disregarded might well exaggerate the injury. One of the clearest duties of the trial Court is to keep from the hearing of the jury irrelevant and prejudicial matter. It would have been a simple matter for the trial Court to examine the report in advance and pass upon what should go to the jury. The Court should have separated it and submitted to the jury the facts, if any, stated in the report.

In *Darnell-Taenzler Lumber Co. v. Southern Pacific* (190 Fed. 659, at 662), District Judge McCall stated: "If the conclusions or orders of the Commission were by the act made *prima facie* evidence of the liability of the defendant, then the declaration is sufficient, but such does not seem to be the case. The act provides that the report of the Commission shall include the findings of fact only in cases in which awards for damages are made and that such findings of fact and orders of the Commission shall be *prima facie* evidence of the facts there-

in stated upon the trial of a suit in the United States Circuit Court brought to recover such awarded damages. 'The act does not make the mere legal opinions, arguments, or reasons of the Commission *prima facie* evidence or evidence of any kind in any judicial proceeding.' *Western New York Ry. Co. v. Penn. Refining Co.*, 137 Fed. 350."

And again, at page 663: "It is only facts found by the Commission and alleged in the declaration that can be considered in deciding whether or not a cause of action is stated."

Although it has been held that in a case tried by the Court without a jury the entire report is admissible, the cases so holding recognize the impropriety of such procedure in a trial by jury. *Southern Ry. v. St. Louis Hay & Grain Co.*, 153 Fed. 728, at 733. (This case was reversed on other grounds; 214 U. S. 297.) *C. B. & Q. v. Feintuch*, 191 Fed. 482.

#### FOURTH POINT.

**Section 16 of the Act to Regulate Commerce is unconstitutional, insofar as it deprives the defendant in a damage suit of a fair trial by jury.**

At the trial the defendant objected on this ground to the receipt in evidence of the opinions and orders of the Commission (R. 61, 63, 67, 70). The defendant also requested the trial Court to direct a verdict for the defendant upon this ground, which request was denied and exception taken (R. 94). The Court in effect charged the jury that the reports and orders of the Commission were *prima facie* evidence of defendant's

liability, and entitled plaintiff to judgment in the absence of controlling circumstances or evidence to the contrary (R. 91). Defendant duly excepted (R. 200), and assigned said charge as reversible error in its assignments of error 8 to 19 (R. 103-105).

In the earlier case of *Western New York & P. R. Co. vs. Penn Refining Co.* (137 Fed. 343), the learned Court of Appeals below said: "The constitutionality of the provisions making 'findings of fact' *prima facie* evidence before a jury has been challenged by sundry assignments of error, but is, we think, beyond reasonable question. The constitutional guarantee relative to trial by jury in the courts of the United States does not exclude legislative authority to effect convenient changes in the rules of evidence, involving no detriment to litigants."

In view of this decision an extended reargument before that Court of the constitutional question was not attempted. As to this, the Court in its opinion below stated: "In view of this decision (*The Western New York & P. R. Co. Case*), counsel for the plaintiff in error does not attempt a reargument of the question before this court. The question as to the other grounds of constitutionality, is disposed of by the view taken as to what may be the proper interpretation and application of the provisions of the statute."

It is clear that the provisions of Section 16 are unconstitutional if, and in so far as, they take from the jury the decision of the essential issues of fact and substitute for the judgment of the jury the judgment of the Interstate Commerce Commission. The Court below had this in mind when, in the *Penn Refining Company case*, it interpreted the section as effecting only "convenient changes in the rules of evidence involving no detriment to litigants" (137 Fed. 350).



In the case at bar the trial Judge extended the meaning of the provision to cover the right to impose upon the jury the conclusion of the Commission as conclusive of liability in the absence of controlling circumstances to the contrary. The trial Judge further allowed in evidence before the jury, arguments, opinions and conclusions of the Commission as distinguished from facts stated in the report. It was clearly the duty of the trial Court to avoid any interpretation or application of the provision that would render its validity doubtful. (*United States vs. Delaware and Hudson Company*, 213 U. S. 366, 407.) But no attempt was made by the trial Court to protect defendant's right to a fair trial. On the contrary, a course was pursued that so clearly prejudiced the defendant's case as to render the jury trial a farce. In practice the section was applied not as a "convenient change in the rules of evidence," but on the contrary as a subversion of defendant's constitutional rights.

We are convinced that there is very grave doubt as to the constitutionality of the reparation provisions in Section 16, regardless of how they are applied. Our conviction is so strong in this respect that we present the reasons therefor, having in mind at the same time that in the present case the application of the section was so prejudicial to the defendant's rights that it is not strictly necessary to decide in this case whether the section is constitutional if properly interpreted and applied. The provisions of any statute can be so misinterpreted and misapplied as to render the statute as applied invalid, although the statute in general may, if properly interpreted and applied, be valid and enforceable.

In the original Interstate Commerce Act of 1887 (Sec. 16) an attempt was made to provide for enforcing damage awards of the Commission in equity suits. No distinction was made between the practice for enforcing an order involving a rule of future conduct and an order for the payment of money. Certain parties came before the Commission seeking awards of damages, but the Commission, in 1888, took the position that a claim for pecuniary damage presented a case at common law in which the defendants were entitled to a jury trial. (*Councill v. Railroad Company*, I, I. C. C. Rep. 339, at 344; *Heck & Petree v. Railroad Company*, I, I. C. C. Rep. 495 at 502; *Riddle, Dean & Co. v. Railroad*, I, I. C. C. Rep. 594, at 607; *Rateson v. Railroad*, III, I. C. C. Rep. 266, at 279; *Macloon v. Railroad*, V, I. C. C. Rep. 84, at 92.) In its first decision (the *Councill case*) the Commission stated: "Under the Seventh Amendment of the Constitution of the United States the defendant, in any case at common law, is entitled to a trial by jury. This claim is, in its nature, an action of trespass, and therefore presents such a case; and when, on the hearing, the complainant offered evidence of pecuniary damages as a basis for an award, the Commission, because it could not give such a trial, declined to go into that question." (I, I. C. C. Rep., at 344.) And, in the *Macloon case*, the Commission said: "Besides this, it seems clear that where in any case the sole question involved is one of reparation for past damages, a constitutional right to jury trial exists, and the 16th section failed to provide for jury trial in any case whatever." (V, I. C. C. Rep., at 92.) In its first annual report the Commission stated that it "Has not discovered in the statute a purpose to confer upon it the general power to award damages in the cases of which it may take cognizance.

The failure to provide in terms for a judgment and execution is strong negative testimony against such a purpose; but what is perhaps more conclusive is that the act must be so construed as to harmonize with the Seventh Amendment to the Federal Constitution, which preserves the right of trial by jury in common law suits." (V, I. C. C. Rep. 92.)

Thereupon Congress, in 1889, amended the Act with the specific view of omitting from the Act the provisions for the enforcement of the Commission's damage awards. Congress, as well as the Commission, correctly assumed that to enforce an award of damages by the Commission, as such, would deprive the carrier of its right of trial by jury. By the amendment of 1889, Section 16 was amended so that the provision for the enforcement of the award in a court of equity was eliminated and provision made for a trial by jury, at which trial the findings of fact set forth in the report of the Commission "shall be *prima facie* evidence of the matters therein stated." (XXV Statutes at Large, 861.)

Technically this amendment attempts to preserve to the carrier in its entirety the right of an unbiased jury trial. If in practice a petition based upon a reparation order could be treated by the trial Court as a special proceeding, the merits of which involved the trial of certain questions of fact by a jury, perhaps these questions of fact might be so framed and sent to the jury as to reasonably protect the carrier's rights. If, on the other hand, the practice is to be that followed in the present case, the jury trial becomes a farce. The trial Court admitted the so-called report of the Commission with all its accusations, arguments and hearsay statements; instructed the jury that the Interstate Commerce Commission had found the defendant guilty of a wrong whereby Meeker & Company were damaged to the extent of one hundred

and seven thousand dollars and told the jury that it must enforce the order unless the carrier produced "controlling circumstances or evidence to the contrary" (R. 91). As pointed out in the opinion below, the trial Court entirely misinterpreted the meaning of Section 16 of the Act. However, regardless of whether the Act was correctly interpreted or not, the result is that the carrier has not really had a trial by jury of the issues relevant to this damage suit.

The issues of fact which the Commission and Congress intended to preserve for trial by jury are the issues: (a) Has the carrier committed a wrong whereby the shipper has sustained injury? (b) If so, to what amount of damages does the fact and nature of the injuries entitle the shipper? The trial Court, however, substituted an entirely different issue. The jury in this case was asked to decide whether or not the defendant had submitted controlling circumstances to show that an award of the Commission was erroneous and false. Similar issues have been repeatedly submitted to this Court in equity cases and this Court has consistently held that the only controlling circumstances which will invalidate the conclusion of the Commission are failure on the part of the Commission to give a fair hearing. In the present case the defendant was required to go much further and to persuade twelve laymen that the experienced Commission reached a wrong conclusion after a consideration of the same evidence, assumed to be fair and deliberate. If Congress intended that awards of reparation should be enforced this way, it merely substituted a Court of Law for a Court of Equity and left the defendant as before, without a trial by jury of the issues of fact upon which the alleged liability rests. Congress intended the reparation order should be enforced only in case a jury, after a fair trial,

decided: (a) That the carrier has committed a wrong whereby the shipper has sustained injury; (b) That the shipper was damaged thereby in an amount determined by the jury. Such intention has not been carried out in this action, even remotely.

It is needless to state that the constitutional guarantee of the right of trial by jury is a real and practical guarantee. It relates not to technical forms of procedure but to the fundamental right to have issues of fact passed upon by unprejudiced jurors. As to the Seventh Amendment, Mr. Justice Brewer stated (*Walker v. Southern Pacific*, 165 U. S. 593, 596): "Its aim is not to preserve mere matters of form and procedure but substance of right. This requires that questions of fact in common law actions shall be settled by a jury, and that the Court shall not assume directly or indirectly to take from the jury or to itself such prerogative." Presenting the Commission's opinions, arguments and conclusions to a jury with the admonition that the jury must enforce the Commission's award in the absence of controlling circumstances or evidence to the contrary, is but the baldest pretence of observance of the form of a trial by jury without the substance. ~~No one believes that a fair trial by jury can be conducted in any such way.~~

In fact, we fail to see how a fair jury trial can be had in any case where the issues of fact are presented to the jury as issues already determined by the Interstate Commerce Commission against the defendant. The prestige of the Commission, and the knowledge that the question has already been passed upon by jurors of far greater experience are bound to have a controlling influence upon the minds of ordinary jurors. However carefully the case is presented, and however much the jury is warned not to adopt the conclusions of the Com-

mission, the fact remains that there has been placed before the jury the irrelevant and immensely prejudicial fact, that the Commissioners have reached a conclusion adverse to the defendant. No one believes that the carrier, under these circumstances, gets a fair trial by jury. No one who has ever served on a jury, or who has ever summed up before a jury, believes that the defendant has a fair trial.

These considerations were controlling when Congress limited the use of the Commission's reports and orders, before the jury, to the bare statement of the facts stated therein. Congress assumed that the trial Court would be as jealous of the defendant's rights, as was the Commission in 1888 and Congress in 1889. It assumed that courts and the Commission would adopt rules of practice whereby specific facts could be stated to the jury without including statements, possibly not true, unduly prejudicing the defendant's rights. It provided in Section 14 for a separate statement of such facts in the reports. The Commission itself for many years had a rule requiring the parties to submit proposed findings. But, even if the practice were technically correct, this fundamental objection remains: The case cannot be presented to a jury without conveying to the jury knowledge that the issues have already been decided against the defendant by a Commission whose experience and ability must exceed that of the average jurors. However great is the care taken there is this inherent vice and practically, if not technically, the right of trial by jury is abrogated.

The prejudice to the defendant as a litigant is aggravated by the fact that in order to maintain uniformity of administration under the Commerce Act, it has seemed necessary to impose upon the jury as conclusive, the Commission's determination as to defendant's wrong-

doing. It was said in the *Abilene Cotton Oil Opinion* (204 U. S. 426) that a shipper seeking reparation predicated upon the unreasonableness of an established rate must primarily invoke redress from the Commission "which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule because the rates fixed therein are unreasonable." We can give no more cogent statement of the doctrine of that case than that of Mr. Justice Pitney, in his dissenting opinion in *Mitchell Coal Co. v. Pennsylvania R. R.* (230 U. S. 247, at 295): "In short, what the *Abilene Cotton Oil* case decides is, that with respect to interstate commerce the Act by its own language prescribed *how it should be determined what rates should be charged by carriers, and how such rates should be made manifest; and that while Sec. 1 of the Act prohibited any charge beyond just and reasonable rates, it imposed the duty of establishing and publishing schedules, to the very end of enforcing that provision, and in the effort to prevent unjust preferences and discriminations it rendered it unlawful to depart from the established schedules until they were changed by the administrative Commission; wherefore the rate thus established and published must be deemed in law a reasonable rate for all purposes affecting the rights of the carrier and shipper between themselves until it had been altered by the Commission, which might be done if they found it unreasonable in fact.*"

But the same reasoning which holds the established rate to be conclusively legal in the absence of a finding to the contrary by the Commission, renders the determination of the Commission, when found, equally conclusive. Hence, as stated by Mr. Justice Lamar, in the controlling opinion in the *Mitchell Coal Company Case*



(230 U. S. 247, at 258): "Such orders, so far as they are administrative, are conclusive, whether they relate to past or present rates, and can be given general and uniform operation, since all shippers, who have been or may be affected by the rate, can take advantage of the ruling and avail themselves of the reparation order."

As stated in the opinion below, on re-hearing, the logic of the situation is that "Where the illegality of the act charged depends upon whether it be reasonable or unreasonable, the option given by section 9 cannot be literally interpreted, as the determination of this issue calls for an exercise of the discretion of the administrative body. When that administrative function has been performed and the rate complained of has been found to be unreasonable or unjust, such finding is conclusive, whether it relate to past or present rates or practices. As said by Mr. Justice Lamar, it is as if the reasonable rate or practice was established in the statute itself" (R. 154).

In practice, then, must not the jury trying a damage case be given binding instructions that the carrier has committed a wrong? Of the two elements inherent in every damage suit, the *injuria* and the *damnum*, must not the issue as to the former be decided against the defendant before the jury is called? The defendant thus enters the case not only with the prejudice attending an unfavorable decision by the Commission, but under a conclusive presumption of guilt.

We cannot believe that when the Commission, in 1888, refused to pass upon damage claims because such action would deprive the litigants of the right to a fair jury trial, and when Congress sought to preserve that right by the amendment of 1889, either the Commission or Congress had it in mind, to preserve solely the right

to assess damages before a jury. Neither the Commission nor Congress intended to compel the carrier to face a jury under a conclusive presumption of guilt and submit to that jury's assessment of damages. Such a result, if contemplated, must have made the conscious effort to preserve the carriers' rights appear ludicrous. If the railroad must go before the jury admitting its guilt, it would be far better for it that damages be assessed by the Commission than by a jury prejudiced at the outset against the defendant by the forced admission of guilt.

But what is this guilt which the defendant is estopped to deny? It consists in charging an established rate or conforming to an established practice which, when and as charged, and when and as performed, constituted the only legal rates and the only legal practice. In short, the Railroad is convicted of guilt for conforming with the law of the land. It is true that the law of the land has become changed by a recent determination of the Commission. And this determination becomes the law for past, as well as present, transactions. But, must the carrier go before a jury convicted of having violated from 1901 to 1907 a law made in 1911?

The main purpose of the Commerce Act is to afford an effective means for redressing the wrongs resulting from unjust discriminations and undue preference. To effect this uniformity it seems that in a reparation case the acts of the carrier must be judged, as to their legal quality by comparison with a conclusive fiat of the Commission. The Commission's fiat is rendered long after the act to be judged was committed. But by "projecting" an administrative fiat into the past the carrier is placed in the position of charging more than an established rate. This of course would be the baldest fiction

as there could not be two established rates at the same time for the same service. The carrier if guilty at all was guilty of charging an unreasonable established rate. Its act is lawful or unlawful according as it was reasonable or unreasonable. It must be judged by the standards existing at the time it acted and not by an artificial standard set up at a future date.

Of course, a carrier cannot be guilty of violating in 1907 a law made in 1911. It could, however, be guilty of violating the law made in 1887, or in 1906, providing (in section 1) that every unjust and unreasonable charge is prohibited and declared unlawful. As stated by Mr. Justice Lamar, in his opinion in the *Mitchell Coal Company Case* (230 U. S. 247, at 255): "There are two classes of acts which may form the basis of a suit for damages. In one the legal quality of the practice complained of may not be definitely fixed by the statute so that an allowance, otherwise permissible, is lawful or unlawful, according as it is reasonable or unreasonable." These two classes of acts are well illustrated, on the one hand by the act of a carrier in charging less than an established rate, and on the other hand, by the act of a carrier charging the established rate, which, although the only lawful rate, is nevertheless unreasonable in fact. If put on trial for charging less than a tariff rate the guilt of the defendant is determined by comparing the rate charged with a definite rate established by law. The legal quality of the act has been definitely fixed in advance by statute or administrative act. But, where the legal rate is charged and the act is lawful or unlawful, according as it is reasonable or unreasonable, the guilt of the carrier must depend solely upon the question of reasonableness and not upon a subsequent administrative act of the Commission. When the Commission does subsequently pass upon the

reasonableness of a rate already charged, it passes upon the guilt or innocence of the carrier. It has no other possible function, and this truth cannot be hidden beneath the fiction that the Commission is making rates or laws for the past. The determination of the Commission as to the reasonableness of a past rate is but a trial by an administrative body of the issue of the carrier's guilt or innocence. For since the quality of the act is to be determined, not by reference to any law or order in force when the act was committed, but solely by reference to whether the rate or practice complained of was reasonable or unreasonable, it follows that if a carrier is sued for damages upon the alleged ground that an established rate charged in the past was unreasonable, the basis of recovery must be the unreasonableness of the rate. The Commission in determining that issue does exactly what a jury would do, if the case were tried by it, and nothing more. The Commission, when it determines what should have been a rate in the past, does not fix or prescribe a rate. The rate has been charged and is beyond fixing. The only thing the Commission can do is to qualify the past conduct as lawful or unlawful. As stated by Mr. Justice Lamar in the opinion in *Baer Bros. v. Denver & R. G. R. R. Co.* (233 U. S. 479 at 486): "But awarding reparation for the past and fixing rates for the future involve the determination of matters essentially different. One is made by the Commission in its *quasi*-judicial capacity to measure past injuries sustained by a private shipper; the other, in its *quasi*-legislative capacity, to prevent future injury to the public."

Since, as it seems, this determination of the Commission must be conclusive, the damages, if collected at all, must be taken without a trial by jury of the

fundamental issue of fact, namely, the question of defendant's guilt or innocence. As stated in the *Mitchell Coal Company Case*: "The courts have not been given jurisdiction to fix rates or practices in direct proceedings, nor can they do so collaterally during the progress of a law suit when the action is based on the claim that unreasonable allowances have been paid. If the decision of such questions was committed to different courts with different juries the results would not only vary in degree, but might often be opposite in character—to the destruction of the uniformity in rate and practice which was the cardinal object of the statute. The necessity under the statute of having such questions settled by a single tribunal in order to secure singleness of practice and uniformity of rate has been pointed out and settled in the *Abilene, Pitcairn and Robinson cases* \* \* \* ." (230 U. S., at 255.)

But the Meeker cases, bringing up for consideration, as they do, the actual use in a damage case of the Commission's report, as distinguished from the absence of such report as in the *Abilene, Pitcairn, Robinson, International Coal, Mitchell and Morrisdale cases*, involve questions of grave importance not raised in the former cases: Is defendant's right of trial by jury protected in a damage case, when the fundamental issue as to the lawfulness of the acts complained of must be conclusively determined, after the event, by an administrative board? Can a judicial determination by the Commission be substituted for the verdict of a jury? Did Congress, in passing the 1889 amendment, intend or in any way provide, that the issue of reasonableness should be taken from the jury and judicially determined, *after the event*, by the Commission?

Having determined that defendant may not be tried without a conclusive finding of the Commission, the question remains: Should defendant be tried with a conclusive finding of the Commission? Although it is necessary and proper to limit the remedy Congress intended to grant, Congress alone can create a remedy. If Congress has attempted to provide an incidental remedy, based upon a finding by the jury that an established rate was unreasonable, this remedy can be limited, and even abrogated, to give full effect to the main purposes of the act. But, until Congress has again acted, an entirely different remedy based upon a conclusive judicial determination by the Commission cannot be substituted.

As pointed out in the dissenting opinion in the *Mitchell Coal Co. case*, the shipper is, by rule of necessity, deprived of his jury trial unless he prevails before the Commission (230 U. S. at 281). But does not the same rule of necessity deprive the carrier of its right to a jury trial and in a much more dangerous and pernicious sense? Where a carrier charged the established rate, which the act compels it to charge, it would seem that the reasonableness of its conduct must be submitted to a jury before damages can be adjudged. The lawfulness of conduct should not be determined by arithmetical comparison between a legal rate charged and a fictitious rate subsequently fixed by an administrative body. To entitle the shipper to damages, a fair preponderance of legal evidence relevant to the issue of reasonableness and fairly submitted to a jury should be essential.

Let us assume, as might well be the case, that the rates attacked by Mr. Meeker had been found reasonable by the Commission in 1898. (Slightly lower rates were in fact found reasonable by the Commission in 1891) (R. 46, 47). Owing to changed conditions the

Commission decides in 1911 that the rates should be further reduced and attempts to "project" this decision, with the force of a pre-existing law, back ten years into the past. Is it reasonable that the carrier must be conclusively presumed to have violated the Commerce Act when it charged established rates designated by the Commission? The carrier has every right, moral, equitable and legal, to insist that its conduct be judged by comparing it with a definite existing standard, such as an established rate, or in the absence of a definite standard, to have the lawfulness of its conduct determined by the jury.

It must be borne in mind that we are discussing damage suits—suits where the aggrieved party asks to have money taken from the defendant to make good damage incurred by reason of defendant's unlawful act.

As stated in the above quotation from the opinion in *Baer Bros. v. Denver & R. G. R. R. Co.* (233 U. S. 479, at 486), the Commission in awarding reparation is determining a private matter and measuring past injuries sustained by a private shipper. As stated in the opinion below: "When we come, however, to a reparation case, we encounter at once, not the question of making efficient the orders of the Commission as an administrative body, and of enforcing its proper control over Interstate Commerce, but the right of an individual plaintiff to recover compensation from the defendant for damages alleged to have been actually incurred by reason of such defendant's unlawful conduct. We are dealing not with governmental control over those engaged in a *quasi* public employment, but with a personal controversy, which, under our traditional institutions and constitutional system, can only be determined, as other personal controversies of the



kind are determined, by a jury trial at common law" (R. 141).

And to the same effect is the opinion in *Lehigh Valley v. Clark* (207 Fed. 717, at 723; p. 104):

"As to the provisions covering reparation cases, Congress is no longer dealing with those matters which concern the practical management and conduct of the business of carriers and the regulation thereof *in futuro*, in the interests of the public generally, but is conferring a private right of action upon those who have suffered actual damage, by reason of such carriers' violation of some requirement of the Act. The conferring of such right of action, though incident to its power to regulate commerce, is not a regulation thereof. It makes redress of a private injury actually suffered, possible."

The Commission, in 1888, called the attention of Congress to this inherent distinction between governmental control and personal controversy. Thereupon Congress amended the act to substitute trial by jury for trial by Commission.

It cannot be assumed that Congress in enacting the amendment of 1889 intended that the main issue as to lawfulness should still be tried by the Commission or that the carrier should be prejudiced at the threshold of the case by a conclusive presumption of guilt. The provisions of the amendment making the report of the Commission *prima facie* evidence only of stated facts is inconsistent with an intention to make the Commission's determination as to the carrier's conduct evidence of guilt, conclusive or otherwise.

Congress certainly has not expressed the intention that defendant's guilt or innocence shall be determined by comparison with a judicial determination by an administrative board, made long after an act is committed. Even if Congress has the power to make such

a law, no attempt has been made to exercise such power. It may well be that to preserve the efficiency of the Commerce Act the Commission's determination as to reasonableness must in all cases be deemed conclusive. There is not the slightest evidence, however, that Congress intended to make such a determination conclusive in a reparation case. If damage cases cannot be tried without imposing upon the defendant, as conclusive, an *ex post facto* edict of an administrative body, then damages should not be allowed; at least, not until Congress has affirmatively stated that the defendant's right of property shall be dealt with in that extraordinary manner. It seems more reasonable to assume that Congress would refuse to allow damages where the established rate is charged than to enforce in a suit for damages a conclusive rule of conduct not determined upon when the rate was charged. If Congress should pass a two-cent per mile passenger fare law, it would not attempt to give reparation on that basis to former travelers. No more did Congress intend that the Commission should exercise the legislative power of fixing, in 1911, rates to apply conclusively to transactions of 1907.

Section 10 of the Act provides for criminal prosecutions, heavy penalties, and in certain cases imprisonment for violating the provisions of the Act. If a carrier were indicted for charging an unreasonable rate or carrying out an unreasonable practice, the jury, under the doctrine of the *Abilene Cotton Oil Case*, could not pass upon the reasonableness of the practice or the reasonableness of the rate. That must be at first decided by the Commission. When decided it may well be that such determination by the Commission must be conclusive. But the same rule of necessity which makes the Commission's determination conclusive, makes it im-

possible to use the determination in a criminal prosecution. In other words, a carrier should not be prosecuted for failing to comply with a rule of conduct to be determined by the Commission in the future.

Congress clearly intended that the jury should decide in each case whether the carrier has violated the Act. The election of remedies which Congress attempted to give in Section 9 shows conclusively that Congress believed, when passing the Act, that the issue as to the lawfulness of the carrier's conduct was for the jury. It certainly did not have in mind that such issue was to be conclusively determined in damage cases by the Commission. If the damage suits provided for in 1889 by the amended Section 16 may not be tried by a jury but must be tried half by jury and half by the Commission, a remedy (novel and *sui generis*) results which Congress has not yet provided or even contemplated.

When, in 1888, the Commission stated to Congress that it (the Commission) deemed the provision for enforcing damage awards in equity suits unconstitutional, Congress might perhaps have taken the position that established rates were legal only by sufferance and until the Commission got around to pass upon them. Congress perhaps could have said that the carriers in collecting established rates not yet passed upon by the Commission held a part of such rates in trust, as it were, to be restored when the Commission should find time to determine the amount of overcharge, if any. But Congress did not see fit to inject such an element of uncertainty into the carriers' business. It abandoned entirely any attempt to enforce the Commission's awards and left shippers to their remedy by damage suits at common law. Congress did not provide for a suit in equity in which half of the issues were to be framed for a jury. Congress did not attempt to create a ~~new form of action~~

in which the issues should be tried, half by the Commission and half by the jury. Congress provided that damages must be collected, if at all, in damage suits at common law, which shall proceed (with the exception as to certain *prima facie* evidence) in all respects like other civil suits for damages (§16 of the Act). Since the suit is not in equity and not in admiralty, it follows that the issues must be tried by jury, for the seventh amendment to the Constitution, protecting the right of trial by jury, embraces "all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights." We quote from the opinion of Mr. Justice Story, in *Parsons v. Bedford*, III. Peters 433 at 446. Mr. Justice Story there said (beginning at page 445):

"The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. The right to such a trial, it is believed, incorporated into, and secured in every state constitution in the union; and it is found in the constitution of Louisiana. One of the strongest objections originally taken against the constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases. As soon as the constitution was adopted, this right was secured by the seventh amendment of the constitution proposed by Congress, and which received an assent of the people so general, as to establish its importance as a fundamental guarantee of the rights and liberties of the people. This amendment declares, that 'In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact once tried by a jury shall be otherwise re-

examinable in any court of the United States than according to the rules of the common law.' At this time there were no states in the union, the basis of whose jurisprudence was not essentially that of the common law in its widest meaning; and probably no states were contemplated, in which it would not exist. The phrase 'common law,' found in this clause, is used in contradistinction to equity, and admiralty, and maritime jurisprudence. The constitution has declared, in the third article, 'That the judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States and treaties made or which shall be made under their authority,' etc., and to all cases of admiralty and maritime jurisdiction. It is well known that in civil causes, in courts of equity and admiralty, juries do not intervene, and that courts of equity use the trial by jury only in extraordinary cases to inform the conscience of the court. When, therefore, we find, that the amendment requires that the right of trial by jury shall be reserved in suits at common law, the natural conclusion is that this distinction was present to the minds of the framers of the amendment. By common law, they meant what the constitution denominated in the third article 'law': not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those, where equitable rights alone were recognized, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law and of maritime law and equity was often found in the same suit. Probably there were few, if any, states in the union, in which some new legal remedies differing from the old common law forms were not in use, but in which, however, the trial by jury intervened, and the general regulations in other

respects were according to the course of the common law. Proceedings in cases of partition and of foreign and domestic attachment, might be cited as examples variously adopted and modified. In a just sense, the amendment then may well be construed to embrace all suits, which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights."

A shipper who succeeds in a reparation case necessarily obtains a preference. It is fair to assume that a very small number of shippers who pay a rate which is thereafter reduced ever in practice receive reparation. The necessity that all shippers shall fare alike underlies the reasoning in the *Abilene Cotton Oil Case*. But the same discrimination and rebating takes place, although under a technical legalized form, as the result of a successful reparation proceeding. In the present case Mr. Meeker endeavors to recover a large sum of money, consisting of parts of tariff rates paid by him between August 1, 1901, and July 1, 1907. In a second case he is endeavoring to recover for a subsequent period. In the meantime all other shippers have been paying the tariff rates. Mr. Meeker, if he is successful in collecting his reparation, would receive a refund of tariff rates which would give him an enormous preference over his competitors. As we shall point out in connection with the Limitation Points, later discussed, it is not the policy of Congress to extend the granting of these legalized rebates.

There is the further objection to imposing upon the jury, in a damage suit, as *prima facie* or conclusive, the conclusion of the Commission as to reasonableness of a past rate or practice, namely, that such a provision if attempted by Congress would not be an exercise of the constitutional power to regulate commerce.

At the trial defendant objected on this ground to the receipt in evidence of the opinions and orders of the Commission (R. 61, 67, 70). The defendant also requested the trial Court to direct a verdict for the defendant on this ground, which request was denied, and exception taken (R. 94). The defendant requested the Court to charge as follows: "The order and findings upon which the plaintiff's case rest are invalid, because on their face they purport to regulate commerce which was completed before the time when the order was made, and which, therefore, was not subject to regulation at that time; it not being within the power of Congress to provide by legislative enactment that the Interstate Commerce Commission can make findings upon which there may be a claim for a reparation of damages to a petitioner before that body, and then provide that on the trial of a suit to recover such alleged damages the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated; the power to regulate commerce does not include the power to dispose of proceeds of past transportation transactions. The power to prescribe what shall be a reasonable charge for interstate transportation does not include the power to say what shall be done with the money collected from shippers in the past, and, therefore the verdict must be for the defendant" (R. 95).



**FIFTH POINT.**

**The complaint in the proceeding before the Commission was filed July 17, 1907, at a time when the right of the Commission to pass upon the discrimination claims and the greater part of the excessive charge claims had expired by limitation.**

At the trial the defendant objected on this ground to the receipt in evidence of the reports and orders of the Commission (R. 59-61, 68-71). The defendant also requested the Court to direct a verdict for the defendant on this ground, which request was denied and exception taken (R. 97, 98). In making said requests and objections the several limitations relied on were specified and exception taken as to each. The defendant also excepted to that part of the charge wherein the Court stated that there were no such limitations applicable to plaintiff's claim (R. 92, 94). Assignments of error in point are numbers 19, 36, 37, 38 (R. 105, 108, 109).

The questions raised under this point involve the interpretation of the limitation clauses in Section 16 of the Act, as amended June 29, 1906. These clauses are as follows: "All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit court within one year from the date of the order, and not after: *Provided*, that claims accrued prior to the passage of this Act may be presented within one year" (Vol. 34, United States Statutes at Large, Part 1, p. 590).

With the exception of claims amounting with interest to \$6,211.41, all of the claims involved in this action ac-

crued prior to June 29, 1906, the date of the passage of the Hepburn Act (R. 83). The question is, what part of the claims that accrued prior to June 29, 1906, had by limitation passed beyond the jurisdiction of the Commission when Mr. Meeker's complaint before the Commission was filed, on July 17, 1907.

*(a) The jurisdiction of the Commission over Mr. Meeker's claims was limited by the two years' limitation in Section 16 of the Act.*

The learned Court below, after quoting the above provisions of Section 16, stated:

"The manifest intention of Congress here, as in all statutes of limitations, was to prevent the accumulation of claims until they were stale, and to compel those who felt themselves aggrieved by the rates exacted by interstate carriers, to use due diligence in availing themselves of the remedial provisions of the act. It surely was not the intent of the amendment passed June 29, 1906, that claims prior to that date which had accrued as far back as 1887, might be presented to the Commission, provided only they were so presented within one year after the passage of the amending act of 1906. The evident purpose of Congress was to cut off all claims for reparation more than two years old. In order, however, to prevent those whose accrued claims were two years old at the time of the passage of the amending act, from being taken by surprise and put at a disadvantage, as compared with those whose claims had accrued less than two years before the passage of the act, or with those whose claims having accrued after the passage of the act had full notice of the time within which they must be prosecuted, Congress gave a year's time within which claims accruing before the passage of the act might be presented

to the Commission. It would be a harsh construction, however, doing violence to what seems to us the evident intent of Congress, to say that, in giving this time, it did not mean to preserve the two years' limitation, both as to claims before and after the act. We conclude, therefore, that the Commission in this case had no jurisdiction to entertain a claim of the shipper accruing prior to July 17, 1905" (R. 150).

The Commission had taken the position that the two year limitation contained in Section 16 did not apply to claims accrued prior to the passage of the act, if claims were filed within one year from the effective date of the act. For this reason, the Commission allowed reparation in this case back to November, 1900, although the complaint was filed with the Commission July 17, 1907. Their views on this point are set forth in their report in the case of *Nicola, Stone & Myers v. Louisville & Nashville R. R. Co.*, XIV, I. C. R. 199, at 206.

The logical and reasonable construction of the section is, that when the Act was passed, June 29, 1906, the jurisdiction of the Commission was made to include only claims arising within two years, and the one year proviso was inserted solely for the purpose of preventing claims which accrued immediately after June 29, 1904 (two years before the passage of the act), from being outlawed because of the inability to file claims immediately after the passage of the act. In other words, those who prepared the proviso saw that a shipper whose claim antedated the taking effect of the act, would not have the opportunity, by reason of the law not having become fully promulgated and understood, to present all of his claims which had accrued within two years before the passage of the act, whereas, the shipper whose claim accrued after the act would have that advantage. It

was the intention of the law to limit everybody to two years, but the one year proviso was inserted not for the purpose of extending the right of shippers back to the organization of the Commission, or even back for five years, but for the purpose of protecting shippers against having their claims cut off because they could have no opportunity to understand the law and present their claims.

When Congress established the two year limitation its purpose was to prevent inequalities by forbidding shippers to sue upon claims long accumulated, and thereby obtain preferences. It is clear that when Congress passed the Hepburn Act, it had the power to provide that no one could recover damages. Under the doctrine of the *Abilene Cotton Oil Case* that would have been a logical thing to do. Since the recovery of any amount by a shipper is a discrimination, the recovery of such amounts through the procedure prescribed in the act might be called a judicial rebate. Although Congress might lawfully and consistently have cut off all claims for damages, it went only so far as to cut off claims more than two years old, thus abolishing many inequalities without arriving at absolute equality.

The purpose of Congress, which was to abolish inequalities, is inconsistent with the claim that Congress intended to divide shippers into two classes—those whose claims accrued prior to the Act, and those whose claims accrued subsequent to the Act; and as to shippers whose claims accrued prior to the Act, allow the inequalities to survive.

Congress had the power to abolish all discriminations, and since 1887 no shipper has had a vested right to sue for reparation (*Maryland v. B. & O.*, 3 Howard, 534; *Norris v. Crocker & Egbert*, 13 Howard, 429 at 440).

If Congress has the power to provide that the Commission may go back into the past and create a liability, it certainly has the power to say just how far back the Commission can go. The question is not one of limitation of actions, but of the extent of the jurisdiction of the Commission. Congress, in conferring jurisdiction upon the Commission could, of course, limit that jurisdiction to two years or any other reasonable period.

That it was the intention of those who framed the amendment to limit all claimants to two years, is shown by reference to the proceedings of Congress. (Congressional Record, May 11, 1906, p. 6706.) It seems that the Cattlemen's Association had claims for reparation which had been accruing. They sent Mr. Culberson a telegram asking him to insert an amendment allowing one year to file accrued claims before the Commission. Mr. Culberson thereupon proposed to extend the two years to three. Mr. Dolliver then stated: *"I think the matter could be better got at by leaving the limitation two years and adding in case of claims already accrued, an additional year."* To meet this suggestion, Mr. Culberson stated: "I move, therefore, that the suggestion of the Senator from Iowa to add after the word 'after,' in line 22, page 13, the words: 'Provided, That accrued claims may be presented within one year,' that means one year after the passage of the act." The amendment was thereupon agreed to. In other words, the express purpose in adding the one year clause was to give claimants whose claims had accrued within two years prior to the passage of the act three years instead of two years. It is clear that those who inserted the clause intended to make three years the outside period and that a con-

struction which would open up claims for a longer period than three years would be destructive of the true intent and purpose of the amendment. As Mr. Dolliver stated: "We ought to be careful not to get it in such shape that the claimant may allow his claims to accumulate for a long time before he even complains about them and then by these actions recovers a large accumulation of damages."

If the one year proviso were held to mean that shippers might file claims which accrued prior to the Act, regardless of how long prior to the Act they accrued, then, to be consistent, all claims accruing prior to the passage of the Act must be held to have been taken, as a group, entirely out of the limitation. If this had been the intention, a clear wording of that intention would have been "This limitation shall not apply to claims accruing prior to the passage of the Act." Such a clause would not be a proviso upon the two year limitation, but would abolish the two year limitation insofar as past claims were concerned. But it has been held, both by the Commission and the courts, that such was not the intention of Congress. In *Dickerson v. Louisville & Nashville R. R. Co.* (XV, I. C. R. 170, 172; 191 Fed. 705, 711), the two years' limitation was held by the Commission and by the Court of Appeals to apply to claims that accrued prior to the passage of the Act as well as to claims accrued subsequent thereto. The claim in that case accrued December 26, 1905. It was contended that the one year proviso excluded that claim entirely from the two year limitation, and that inasmuch as petition was not filed before the Commission until September 5, 1907, the Commission had no jurisdiction. But the Commission held that the two year limitation applied as well to claims accruing before the passage of the Act as those accruing subsequent thereto, and that, therefore,

since the claim was filed within two years from the time it accrued, the Commission had jurisdiction.

For the purpose of extending its jurisdiction, the Commission has held, on the one hand in the *Meeker case* that the one year proviso eliminated all claims accruing prior to the passage of the Act from the two years' limitation, and on the other hand, has held in the *Dickerson case* that it did not do so. The Commission cannot blow both hot and cold. Its interpretation to the effect that the two years' limitation applies to claims accruing both before and after the passage of the Act, which interpretation is approved by the Court of Appeals in the *Dickerson case* and the *Meeker case*, seems to be the correct and logical interpretation of the statute. It gives the proviso its true meaning, namely, that of a qualification, rather than a destruction of the two years' limitation. It is clear that the interpretation of the Commission, as approved in the *Dickerson case*, is absolutely inconsistent with the contention that the one year proviso has excluded from the two year limitation all claims accruing prior to the passage of the Act.

In the foregoing discussion it has been assumed, without admitting, that Mr. Meeker's claim was filed within the one year period. We further submit that:

(b) *Inasmuch as the claim was not filed within one year from the passage of the Act, the Commission had no jurisdiction over any claim accruing more than two years prior to the filing of the complaint. That is to say, the Commission had no jurisdiction over any claims accrued prior to July 17, 1905.*

The passage of the Act was June 29, 1906. Meeker & Co.'s complaint was not filed until July 17, 1907. The Commission, however, assumed jurisdiction over all of Mr. Meeker's claims on the theory that the words "pas-



sage of this Act" referred not to the date of the passage of the Act (June 29, 1906), but to a later date, namely, August 28, 1906. The Hepburn Act was passed and approved by the President on June 29, 1906. It became a law upon that date (Vol. 34, United States Statutes at Large, Part I, p. 595). On the next day the following resolution was passed:

*"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled 'An Act to amend an Act entitled "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, and all Acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission,' shall take effect and be in force sixty days after its approval by the President of the United States. Approved, June 30, 1906."*

(Vol. 34, United States Statutes at Large, Part I, p. 838.)

The Commission interpreted the proviso in Section 16 in connection with the resolution of June 30, 1906, in such a way as to extend the jurisdiction of the Commission to claims accruing prior to August 28, 1906, provided such claims were filed prior to August 28, 1907. The views of the Commission upon the point are stated in the case of *Nicola, Stone & Myers Co. v. L. & N. R. R. Co.*, XIV. I. C. R. 206. As its conclusion the Commission stated: "Viewing together the Hepburn Act, approved June 29, 1906, and the joint resolution relating thereto, approved on the succeeding day, it is our conclusion that the legislative intent was to make the effective date of his act the date from which it speaks for all purposes—August 28, 1906."

As this question could not properly arise until a belated claimant filed a claim subsequent to June 29, 1907,

the ruling was made by the Commission after its jurisdiction had been limited by the expiration of one year from the passage of the Act. The interpretation, therefore, is merely an attempt by an administrative body with restricted powers, to extend its jurisdiction over matters not within its jurisdiction.

The same matter was referred to by the Commission but not fully discussed, in the following decisions: *Goff-Kirby Coal Company v. Railroad*, XIII. I. C. R. 383, at 386; *Missouri & Kansas Shippers' Association v. Railway*, XIII. I. C. R. 411; *Kile & Morgan v. Railway*, XV. I. C. R. 235, at 237; *Woodward & Dickerson v. Railroad Co.*, XVII. I. C. R. 9, at p. 10.

The Commission's interpretation has not received the approval of the courts. In *Louisville & Nashville v. Dickerson* (191 Fed. 705, at 711) the Circuit Court of Appeals of the Sixth Circuit, referred to the limitations in Section 16 as follows: "The Commission held the original communication a sufficient complaint (15 Interst. Com. Com'n R. 170, 172), and we think correctly. It was sufficient to inform the defendant of plaintiff's grievance. Formality was not required. In passing upon the question of the statute of limitations the Commission followed its ruling in *Nicola, Stone & Myers Co. v. L. & N. R. Co.*, 14 Interst. Com. Com'n R. 199, 206, where it was held that any claim accruing before or after August 28, 1906, may be presented within two years from the time it accrued, and that claims accruing before August 28, 1906, may be presented within one year from that date, even though accruing more than two years previous to the date named. *Woodward & Dickerson v. L. & N. R. R. Co.*, 15 Interst. Com. Com'n R. 170, 172; same case on rehearing, 17 Interst. Com. Com'n R. 9. We think this the correct construction of

the statute, and that the claim was accordingly not barred."

The claim involved in the *Dickerson case* accrued December 26, 1905. Complaint was filed before the Commission September 5, 1907. The claim was, therefore, filed over a year after the passage of the Act and also over a year after the effective date stated in the resolution of June 30, 1906. The limitation question involved in the *Dickerson case* was as to whether or not the claim accruing prior to the passage of the Act might be filed within two years from the date the claim accrued, although filed more than one year after the passage of the Act. The Circuit Court of Appeals approved the Commission's ruling to the effect that all claims, whether accruing before or after the Act, might be filed within two years from the time they accrued. The Circuit Court of Appeals did not pass upon and could not pass upon, in that case, the date when the one year period, in the proviso, expired.

If words are to be given their natural meaning, there can be no force to the Commission's interpretation of the proviso. The words are: "*Provided, That claims accrued prior to the passage of the Act may be presented within one year.*" As we shall point out, Senator Culberson, who first introduced the proviso, stated, after reading it: "*That means one year after the passage of this Act.*" It was a case of good plain English.

That Congress meant that the one year period should expire at the close of one year after the passage of the act is clearly shown by reference to the proceedings in the Senate when the proviso was first proposed by way of an amendment to Section 16. We quote from the Congressional Record (under the authority of *Blake v. National Banks*, 23 Wallace, 307, and *Church of the Holy Trinity v. U. S.*, 143 U. S. 457 at 464) :

Senate, May 11, 1906. (Congressional Record, p. 6,700.)

"The Secretary resumed and concluded the reading of Section 5, as follows:

Sec. 5. That Section 16 of said Act as amended March 2, 1889, be amended so as to read as follows:

'Section 16. \* \* \* All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit court within one year from the date of the order and not after. \* \* \*'

Senate, May 12, 1906. (Congressional Record, p. 6,788.)

"The Vice-President: The amendment proposed by the Senator from Texas will be stated by the Secretary.

"The Secretary: On page 13, line 18, before the word 'years,' it is proposed to strike out the word 'two' and insert 'three;' so as to read:

"All complaints for the recovery of damages shall be filed with the Commission within three years from the time the cause of action accrues, and not after.

"Mr. Culberson: Mr. President, just a word in explanation. This paragraph is a mere statute of limitations, as I take it, and yesterday I received a telegram from the attorney of the Cattlemen's Association, which read as follows, after the date and direction:

"Cattlemen's claims for reparation have been accruing; three (*sic*) years limitation clause by Hepburn Bill possibly bars prior to two years; insert amendment allowing one year to file accrued claims before Commission.

S. H. Cowan.

"It seems to me that that statement is sufficient reason for the Senate to adopt this more favorable amendment extending the time one year in which accrued claims may be presented. \* \* \*

"Mr. Dolliver: That section refers to claims for damages on account of overcharges. I think we ought to be careful not to get it in such shape that the claimant may allow his claims to accumulate for a long time before he even complains about them, and then by these actions recover a large accumulation of damages. I think the matter could be better got at by leaving the limitation two years and adding 'in case of claims already accrued, an additional year.' It certainly would not be a good thing to allow a man to wait three years before even complaining about the overcharge and then be entitled to recover for the entire three years.

"Mr. Culberson: I think the suggestion of the Senator simply accomplishes the matter in another way. I have no objection to it. I move, therefore, that the suggestion of the Senator from Iowa to add after the word 'after,' in line 22, page 13, the words:

*Provided, That accrued claims may be presented within one year.*

*"That means one year after the passage of this Act.*

"The Vice-President: The question is on agreeing to the amendment proposed by the Senator from Texas.

"The amendment was agreed to."

The Hepburn Act was in any event effective from June 29th to June 30th, 1906. On this point Judge Landis stated, in his opinion in the case of *United States v. Standard Oil Company*, 148 Fed. 719, at 722:

"It is contended in behalf of the United States that the Act of June 29, 1906, did not go into effect until after these indictments were returned. The pertinency

of this proposition will appear hereafter. It is urged that this postponement was effected by the adoption of the joint resolution by Congress, approved June 30, 1906. That resolution provides that the rate law 'shall take effect and be in force sixty days after its approval by the President of the United States.' Of course, the purpose of this resolution is obvious. But it was wholly ineffective until approved by the President. This occurred on June 30th. And by its own terms the Act became effective upon its approval by the President one day before. Plainly, therefore, on June 30th, the resolution was powerless to postpone that which had already occurred on June 29th. While possibly on June 30th, the resolution might operate to suspend the Act for a period of time (and as to this I express no opinion), the question presented by the demurrers to these indictments are to be determined as if a postponement or suspension of the Act had not been attempted."

The subsequent resolution of June 30, 1906, did not have the effect of repealing the Act, nor did it attempt to state that the date of the passage of the Act should be postponed. To so interpret the resolution is to raise a serious question of its validity. As Mr. Drinker stated in his book on Interstate Commerce (p. 439), "There would seem to be some doubt as to the power of Congress to change the date of the 'passage of the Act,' merely by suspending its operation. It might well be that when the President signed the Act the date of its passage was unalterably fixed."

A reasonable interpretation of the resolution of June 30, 1906, is that from and after the passage of the resolution of June 30th, 1906, the Hepburn Act had exactly the same effect as if the last paragraph of the Hepburn Act had read as follows: This Act shall take effect and be in force from and after the expiration of sixty days

after its passage. That such was the intention, is shown by reference to the proceedings of Congress:

Senate, June 28, 1906. (Congressional Record, p. 9,522.)

"Mr. Tillman: It will be recalled that when we presented the first conference report we had incorporated a provision extending for sixty days the time when the rate law should go into effect. By some strange oversight the Senate had appeared to forget that this complicated machinery could not be put in running order immediately, and conferees provided that it should not take effect until sixty days. But we got such a \* \* \* lambasting here, because we had presumed to put something in which was not in order that we did not feel willing to try that any more. It will be absolutely necessary that the joint resolution which I send to the desk shall be considered and passed immediately, and I ask unanimous consent for its present consideration."

At the close of the amendment of June 18, 1910, it is provided "That this Act shall take effect and be in force from and after the expiration of sixty days after its passage, except as to Sections 12 and 16, which sections shall take effect and be in force immediately" (Sections 12 and 16 are sections of the 1910 Act and not sections of the Interstate Commerce Act).

Section 24 of the original Act of 1887 provided "That the provisions of Sections 11 and 18 of this Act relating to the appointment and organization of the Commission herein provided for shall take effect immediately and the remaining provisions of this Act shall take effect sixty days after its passage."

If the Hepburn Act, which contained in Section 16 the words, "Provided that claims accrued prior to the passage of this Act may be presented within one year" had also contained a provision (as did the Act of June



18, 1910) to the effect that "this Act shall take effect and be in force from and after the expiration of sixty days after its passage," it could not have been contended that the word "passage" in one instance meant the effective date and in the other instance the day the President signed the Act.

As shown by the proceedings of Congress quoted above, the resolution approved June 30, 1906, providing that the Act "shall take effect and be in force sixty days after its approval" was passed because those words had been omitted from the Act of June 29th, through an oversight. If the words, "Shall take effect and be in force sixty days after its approval" had been a part of the Act of June 29th, it could not be contended that the word "passage" in Section 16 referred to the effective date.

The purpose of the one year proviso was to allow a reasonable time within which to present claims which had accrued prior to the passage of the Act. It was a matter of notice and not a matter of prohibition or compulsory action. Congress intended to state a reasonable time within which to present claims after shippers had notice of the requirement that they do so. The passage of the Act gave this notice. Its effective date did not give this notice. The effective date could not give the notice because it had already been given, and the law will presume that everybody knew of the passage of the Act the day after it was passed. One year from the date of the notice was certainly ample time within which to file claims. There is no reason for supposing that Congress intended to give a notice of one year plus sixty days.

It would have been entirely proper for the period within which claims could be presented to have been fixed with reference to a definite date, say July 1, 1907. The specified date has no connection with the continuing

operation of the Act. On June 29th, 1906, shippers were notified that a certain class of claims must be filed with the Commission, if at all, prior to June 29th, 1907. The passage of the Act gave shippers that notice as a matter of law, and that notice was never changed or withdrawn. Even if the extreme interpretation of the resolution of June 30th, 1906, could be sustained to the effect that until August 28th, 1906, the Act must be considered as non-existent, the fact remains that when the Act came to life again, on August 28, 1906, it had in it, the provision that claims should be filed within one year from the passage of the Act, and the passage of the Act was June 29, 1906. But, of course, the plain intent of the resolution was that the Act should remain existent as notice to all concerned, that in sixty days certain requirements and conditions must be met.

The one year proviso constituted a postponement in the same manner that the sixty day resolution constituted a postponement, the only difference being that the one year clause in substance postponed the effective date of a single provision, while the sixty day clause postpones the effective date of all other provisions for sixty days. The sixty days' postponement was to allow time within which the "complicated machinery could be put in running order." There was no such reason for extending the one year notice to one year and sixty days.

Even conceding that the Court might construe the word "passage" to mean "effective date" for the purpose of making a provision of the Act effective, no such violence against language is necessary or proper in this case. The clear intent of Congress was to place in section 16 a provision that certain claims must be filed within a year from the passage of the Act. As Senator Cullerson stated, "*That means one year after the passage of this*

*Act.*" Congress further intended to place at the end of the Act a provision that it should become effective within sixty days from its passage. If the intent of Congress as clearly expressed in the Act and in the resolution is to be carried out, the one year period ended June 30, 1907.

(c) *The complaint before the Commission was filed July 17, 1907. At that time all claims accruing prior to July 17, 1902, had been outlawed by Section 1047 of the Revised Statutes, which provides a five year limitation.*

The effect of this limitation will be argued in connection with its application to the commencement of this action. We now call attention to the limitation, for the purpose of showing the extreme to which the Commission went in opening the door to a recovery, which would give Mr. Meeker an enormous preference.

### **SIXTH POINT.**

**This action was commenced on September 3, 1912, at a time when the plaintiff was barred by limitation from bringing an action upon any of his claims.**

At the trial, defendant objected on this ground to the receipt in evidence of the reports and orders of the Commission (R. 59, 60, 69, 71). The defendant also requested the court to direct a verdict for the defendant upon this ground, which request was denied and exception taken (R. 96-98). In making the objections and requests the separate statutes of limitation relied on were specified and exception taken as to each. At

the close of his charge the Trial Court instructed the jury as follows: "Now, Gentlemen of the Jury, the question of the Statute of Limitations has been raised here, but I instruct you that you will have nothing to do with the question of the Statute of Limitations. The matter of its application is not a matter of fact, but it is a matter of law to be considered by the Court, and, for the present, the Court instructs you that there is no Statute of Limitations which bars the recovery of the plaintiff for either of the amounts presented in this suit, and that, if you take the evidence which is made *prima facie* by the Act of Congress as conclusive of the claim, it will be your duty to render a verdict in favor of the plaintiff for the full amount for both" (R. 92). To this part of the Charge exception was taken (R. 94). The assignments of error in point are Nos. 19, 35, 39 (R. 105, 108, 109).

(a) *Limitations in bar of the discrimination claim (November 1, 1900-August 1, 1901)*:

The plaintiff's entire claim for discrimination expired by limitation on or before August 1, 1906, or five years after the cause of action accrued. The claims are barred by Section 1047 of the United States Revised Statutes. This section provides as follows:

"No suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, shall be maintained, except in cases where it is otherwise specially provided, unless the same is commenced within five years from the time when the penalty or forfeiture accrued; Provided, That the person of the offender, or the property liable for such penalty or forfeiture, shall, within the same period, be found within the United States; so that the proper pro-

cess therefor may be instituted and served against such person or property."

This Court held in the case of *Parsons v. Railway*, 167 U. S. 447, at page 455: "His (a shipper's) cause of action is based entirely on a statute, and to enforce what is in its nature a penalty. Suppose that the officials of the defendant company had charged the plaintiff only a reasonable rate for his personal transportation from his home in Iowa to Chicago, and at the same time had, without any just occasion therefor, given to his neighbor across the street, free transportation, thus being guilty of an act of favoritism and partiality—an act which tended to diminish the receipts of the railroad company, and to that extent the dividends to its stockholders—such partiality on their part would not, in the absence of a statute, have entitled the plaintiff to maintain an action for the recovery of the fare which he had paid, and thus to reduce still further the dividends to the stockholders. So, but for the provisions of the Interstate Commerce Act, the plaintiff could not recover on account of his shipments to Chicago, if only a reasonable rate was charged therefor, no matter though it appeared that through any misconduct or partiality on the part of the railway officials shippers in Nebraska had been given a less rate. It was, among other reasons, in order to avoid the public injury which had sprung from such conduct on the part of railway officials that the Interstate Commerce Act was passed, and violations of its provisions were subjected to penalties of one kind or another. But it is familiar law that one who is seeking to recover a penalty is bound by the rule of strict proof. Before, therefore, the plaintiff can recover of this defendant for alleged violations of the Interstate Commerce Act he must make a case

showing not by way of inference but clearly and directly such violations. No violation of statute is to be presumed."

The point was passed upon by the Circuit Court of Appeals, Fifth Circuit, in the case of *Carter v. New Orleans & N. E. R. Co.* (143 Fed. 99). The action was for damages for discrimination under the Act to Regulate Commerce. The Court held that Section 1047 of the Revised Statutes (which is quoted above) applied to that action. The claim in that case was, that Section 2741 of the Mississippi Code barred the claims after the expiration of one year. The Court, however, held that although the Mississippi Statute might apply in the absence of any provision by Congress, that the State Statute could not apply because Section 1047 of the Revised Statutes covered the case. The Court said at page 100: "Conceding that, in the absence of any provision of the Act of Congress creating a liability fixing a limitation of time for commencing actions to enforce it, the statute of limitations of a particular state wherein the action is brought is applicable (*McClaine v. Rankin*, 179 U. S. 158, 25 Sup. Ct. 410, 49 L. Ed. 702), we do not think that Section 2741 of the Mississippi Code applies in the present case. If the action is remedial only—that is to recover statutory damages—the terms of that section exclude its application. If the action is one for a forfeiture or penalty, and the Act creating the liability fixed no limit of time for commencing the action to recover the penalty, then Section 1047 of the Revised Statutes of the United States seems to cover the case."

Section 344 of the Federal Penal Code of 1910, leaves unchanged the limitations contained in Section 1047 of the Revised Statutes.

(b) *Limitations in bar of the excessive charge claims (August 1, 1901—July 1, 1907):*

Section 1047 of the Revised Statutes, limiting actions to five years from the time that the penalty accrued, applies in bar of plaintiff's entire claim for excessive charges as well as to plaintiff's discrimination claim. This action having been commenced on September 3, 1912, all claims arising prior to September 3, 1907, were barred. The latest claim in suit arose July 2, 1907 (R. 89, 191).

Although in the case of *Parsons v. Railway*, quoted above (167 U. S. 447) the claim was based upon a discrimination, the reasoning of the *Parsons case* applies equally to an action to recover under the act, for excessive charges. Plaintiff's claim is based upon the Statute and is to recover for a violation of that part of the Statute which prohibits the charging of unreasonable rates.

If it should be held that the five year limitation in Section 1047 of the Revised Statutes does not apply, then plaintiff's claim is barred (with the exception of \$3,-853.30 and interest) by the six years' limitation under the Pennsylvania Statute. Excepting claims amounting to \$3,853.30, all the claims arose prior to September 3, 1906, and therefore more than six years prior to the date that this action was commenced (R. 83). The Pennsylvania Statute is as follows:

"All actions of the trespass *quare clausum fregit*, all actions of detinue, trover and replevin for taking away goods and cattle, all actions upon account, and upon the case, other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants, all actions of debt, grounded upon any lending or contract, without specialty, all actions of debt



for arrearages of rent, except the proprietaries' quit-rent, and all actions of trespass, of assault, menace, battery, wounding and imprisonment, or any of them, which shall be sued or brought at any time after the 25th day of April, which shall be in the year of our Lord 1713, shall be commenced and sued within the time and limitation hereafter expressed, and not after; that is to say, the said actions upon the case, other than for slander, and the said actions for account, and the said actions for trespass, debt, detinue and replevin, for goods or cattle, and the said actions of trespass *quare clausum fregit*, within \* \* \* six years next after the cause of such actions or suit, and not after. And the said actions of trespass, of assault, menace, battery, wounding, imprisonment, or any of them, within \* \* \* two years next after the cause of such actions or suit, and not after. And the said actions upon the case for words, within \* \* \* one year next after the words spoken, and not after (Stewart's Purdon's Digest, 13th Ed., Vol. 2, p. 2282).

Section 721 of the Revised Statutes provides as follows: "The laws of the several States, except where the constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decisions in trials at common law, in the courts of the United States in cases where they apply." If, therefore, it should be held that plaintiff's claim, based on the alleged excessive charges, is not a claim for a penalty under the statute and therefore not controlled by Section 1047 of the Revised Statutes, the Pennsylvania six-years'-statute would apply.

When Mr. Judson wrote his treatise on the Interstate Commerce Law (first published in 1905), the two year limitation now contained in Section 16 was not a part of the act. Mr. Judson stated as to limitations under

the act before it was amended in 1906: "This question, however, of the application of the statute of limitations to such claims has not been judicially determined. It would seem from analogy to the application of the statute in suits brought by shippers under Sections 8 and 9 (see *supra*), that the limitation statute as to such rights of action, in the states where the claim is sought to be enforced, should control, and the beginning of the suit to enforce the individual claimant's rights to reparation should be the beginning of the action within the meaning of such statute."

We can find no authority for the proposition that the beginning of a proceeding before the Commission, constitutes a beginning of the action at law for damages. In fact, the contrary has always been assumed. The effect of the proceeding before the Commission is solely to furnish the claimant evidence to prove his case. In *Baer Brothers Mercantile Company v. Denver & Rio Grande Railroad Company* (200 Fed. 614) the District Court held that the suit is an independent judicial proceeding and not an execution of the orders of the Commission. The Court stated at page 616: "Upon questions of fact it is true the finding of the Commission is, under Section 5 of the Act of June 29, 1906, *prima facie* evidence of the facts at the trial of the cause, but this is a mere matter of evidence and has no relation to the pleadings." In *Jacoby v. Pennsylvania Railroad Company* (200 Fed. 989, at 996) District Judge Thompson stated: "As said by Judge Lanning in the *Morrisdale Case*, the procedure of the Commission in making the assessment constitutes no part of a judicial proceeding." The quotation referred to is from the decision in *Morrisdale Coal Company v. Pennsylvania Railroad Company*, (183 Fed. 929, at 937): "As already suggested, the letter of the statute seems to confer upon the Commission the

power to assess damages in every case of discriminatory practices. Its procedure in making the assessment constitutes no part of a judicial proceeding. In a court of law its findings and order are but *prima facie* evidence of the damages sustained." (Affirmed without discussion of this point, 230 U. S., 304.)

In *Western New York & P. R. Co. v. Penn Refining Co.* (137 Fed. 343, at 354) it is stated that the action is, in a qualified sense, independent of the investigation by the Commission, and again at page 349: "The Commission, although clothed with quasi judicial functions, is an administrative body in contradistinction to a judicial tribunal. \* \* \* No 'lawful order or requirement' of the Commission, referred to in Section 16 \* \* \* executes itself. Should the carrier or carriers to whom it is directed not voluntarily obey it, it can be enforced only through judicial proceedings as provided for in that section."

In *Interstate Commerce Commission v. Cincinnati, P. & V. R. R. Co.* (124 Fed. 624, at 630) the Court referred to the suit as "an original, independent responsibility to due inquiry make, exercise its own judgment, and decide causes as they arise or are instituted."

In *Kentucky & Indiana Bridge Co. v. Louisville & N. R. Co.*, 37 Fed. 567, at 613, the Court said: "We are also clearly of the opinion, that this court is not made by the act the mere executioner of the Commissioner's order or recommendation, so as to impose upon the court a non-judicial power." And at 614: "The suit in this court is, under the provisions of the act, an original and independent proceeding, in which the Commission's report is made *prima facie* evidence of the matters or facts therein stated."

The doctrine of these cases clearly is that he who seeks damages for a violation of the Act to Regulate Commerce must sue as any other suitor in a court of

law. This is entirely consistent with the opinions of this Court in the recent cases of *Penn. R. R. v. International Coal Co.* (230 U. S., 184); *Mitchell Coal Co. v. R. R.* (230 U. S., 247), and *Morrisdale Coal Co. v. R. R.* (230 U. S., 304). The action is the same as any other action for damages and the rules applicable to the action are the same as those applicable to the ordinary action for damages.

If Meeker & Company had acted promptly instead of waiting to gather up an enormous claim or legalized rebate, there would have been ample time to get *prima facie* evidence from the Commission and sue within the periods of State or Federal limitations. There is no reason or justice in tolling the statutes, to facilitate an enormous accumulation of damages.

### **SEVENTH POINT.**

**The allowances for counsel fees are invalid and excessive.**

Exceptions were taken to the granting of these fees (R. 99). The allowance of these fees is assigned as error (R. 110).

The trial Court relied in granting the allowances upon the following clause in section 16 of the Act: "Such suit in the circuit court of the United States shall proceed in all respects like other civil suits for damages except that on the trial of such suit the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the circuit court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee to be taxed and collected as part of the costs of the suit."

The Court ordered "That counsel for plaintiff be allowed a counsel fee of Ten Thousand (\$10,000) Dollars for their services in the proceedings before the Interstate Commerce Commission, and a further fee of Ten Thousand (\$10,000) Dollars for their services in the proceedings in this court' (R. 99).

It was error to allow the counsel fee of \$10,000 for services in the proceeding before the Commission, for the reason that the act provides for no such allowance. The act provides that the *petitioner* shall, if he prevail, be allowed a reasonable attorney's fee, to be taxed and collected *as a part of the costs of the suit*. There is no reference to the proceedings before the Commission.

It has been repeatedly held that the proceedings before the Commission are entirely independent of the action, that the action is not a continuation of the proceedings before the Commission, but is an independent legal proceeding. *Baer Bros. Mercantile Co. v. Denver & R. G. R. Co.*, 200 Fed. 614, at 617; *Ky. & I. Bridge v. Louisville & Nash.*, 37 Fed. 567, at 613; *I. C. C. v. Cincinnati, P. & V. R. Co.*, 124 Fed. 630.

Section 8 does not provide for counsel fees for services before the Commission. It refers to fees fixed by Court in case of recovery in court and as a part of the court costs. Pay for services before the Commission if awarded in court as a part of the damages would not be a part of the costs. The word costs in connection with a lawsuit has a definite, established meaning. It refers to "the expenses incurred by the parties in the prosecution or defence of a suit at law" (*Bouvier Law Dictionary*, Vol. I, p. 370). Costs will not be granted unless specifically provided for by statute. They are not granted as a common law right.

*Coggell vs. Lawrence*, 6 Fed. Cases, 2957.  
*Equitable Life Assurance Soc. vs. Hughes*,  
 125 N. Y., 106.

"Statutes which give costs are not to be extended beyond the letter, but are to be construed strictly" (*Bouvier Law Dictionary*, Vol. I, p. 374).

The allowance of \$10,000 counsel fees for services in the action is excessive. As compensation for services rendered it is grotesque. As a penalty it is entirely unwarranted by law or by the circumstances of the case. As the statute limits the allowance to "a reasonable attorney's fee," the amount of the fee must be measured by the services performed. The application was made before the trial Court upon the minutes. The only evidence before the trial Court as to what would be a reasonable fee is contained within the covers of the record in the case. No affidavit was submitted in support of the request for an allowance. Plaintiff's counsel elected to rely upon whatever evidence there was in the record of the amount and value of his services. The statute purports to furnish the petitioner with a cheap and simple method of proving his case. Plaintiff's counsel relied exclusively upon that cheap and simple method. He introduced the opinions and orders of the Commission and rested. We submit that the trial Judge in allowing a fee of \$10,000 acted beyond his discretion, and that the allowance should be reduced to a small fraction of that amount.

The provision of the act permitting the allowance of an attorney's fee is unconstitutional, within the authority of *Gulf, Colorado & Santa Fe Ry. Co. v. Ellis*, 165 U. S. 150. In that case a Texas statute was declared void because it allowed an attorney fee of \$10. The act provided that if the Railroad refused to settle a claim

and the claimant finally recovered there might be added to the costs of the suit reasonable attorney's fees. The Supreme Court held that the statute arbitrarily singled out one class of debtors and punished it for a failure to pay its debts. It was, therefore, declared void. The Court stated at page 159: "But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this." And again, at page 160: "No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government." The *Ellis case* was distinguished in *Atchison, Topeka & Santa Fe R. R. v. Matthews* (174 U. S. 96). In the *Matthews case* the Supreme Court held valid an act of Kansas which allowed an attorney's fee to a plaintiff recovering from a Railroad damages on account of fire. The distinction between the *Ellis case* and the *Matthews case* is clearly stated at page 98. The purpose of the statute in the *Ellis case* was conceded to be to compel the payment of debts. The purpose of the statute in the *Matthews case* was to promote the public interest by compelling railroads to operate their trains with the utmost precaution. These two cases are cited in a long line of decisions. The principle is simple, but its application has been difficult. As to the railroad cases, however, we think it can be stated concisely and accurately, that where the statute imposing the attorney fee has for its object, not the enforcement of a debt, but an improvement in the performance of a public service, the statute is valid. If, on the other hand, the sole purpose of the statute is to compel the payment of the amount involved, it is invalid. The distinction is clearly pointed out in *Seaboard Air Line v. Seegers* (207 U. S. 73). In this case a South Carolina statute, allowing an attorney's fee



after collection by suit of claims against a railroad, was sustained. The Court said, at page 78: "It must be remembered that the purpose of this legislation is not primarily to enforce the collection of debts, but to compel the performance of duties which the carrier assumes when it enters upon the discharge of its public functions."

If valid, the allowance must be construed as a penalty to enforce the performance by the carrier of its duty. A statute granting a penalty must be strictly construed and not extended beyond its letter.

It seems clear that the effect of the clause as to attorney's fees and costs in section 16 is to penalize the carrier that insists upon its right to a trial by a jury. The award by the Commission having been made, the remaining question is, shall the carrier voluntarily pay the award or shall it insist upon this right of a trial by jury. There certainly is no public interest involved in compelling a carrier to pay these awards by waiving its right to a jury trial. For the most part the awards amount to legalized preference, and it cannot be to the interest of the public to facilitate their collection. The effect of the provision is, that Congress has attempted in one clause to make its act valid by saving the right of trial by jury, and in a succeeding clause has penalized the carrier who seeks to take advantage of this right.

In any event, petitioner is not entitled to an attorney's fee unless he is sustained in his recovery in the entire amount (*Seaboard Air Line v. Seegers*, 207 U. S. 73, at 77).

EDGAR H. BOLES,  
Solicitor for Respondent.

JOHN G. JOHNSON,  
FRANK H. PLATT,  
GEORGE W. FIELD,  
Counsel.

**APPENDIX.**

LEHIGH VALLEY R. CO. *et al.* v. CLARK, *et al.*

(Circuit Court of Appeals, Third Circuit, August 25, 1913.) (207 Fed. Rep. 717.)

In Error to the District Court of the United States for the Eastern District of Pennsylvania; James B. Holland, Judge.

Before GRAY, BUFFINGTON, and McPHERSON, Circuit Judges.

GRAY, Circuit Judge. In the court below, suit was brought by the defendants in error (hereinafter called the plaintiffs) against the plaintiffs in error (hereinafter called the defendant companies) under authority of the Act of Congress of February 4, 1887, amended by the Acts of March 2, 1889, and of June 29, 1906 (see 24 Stat. c. 104, 25 Stat. c. 382, and 34 Stat. c. 3591), to recover damages from the defendant companies, alleged to have been awarded by way of reparation to the plaintiffs, in certain proceedings had before the Interstate Commerce Commission.

As authorized by section 13 of said Act, the plaintiffs, on April 4, 1908, applied by petition to the said Commission, complaining that defendant companies, during certain named years, had exacted and collected from the plaintiffs the rate of \$2.00 per gross ton for the transportation of pyrites cinder, by rail from Buffalo, New York, to points of destination in Pennsylvania and New Jersey. The plaintiffs, as petitioners as aforesaid, attacked the rate of \$2.00 per gross ton on pyrites cinder, as excessive, unjust, unreasonable, and unduly discriminatory, and therefore in violation of the said Act and the Acts amendatory thereof, and prayed that the de-

defendant companies be ordered to desist from exacting and collecting such unreasonable rate; that a lower rate be put in effect, and that reparation be granted to the petitioners. The defendant companies, having been served with a copy of said complaint, made answer thereto; issue was joined, and the cause regularly heard and argued by the parties. Thereafter, January 5, 1909, as alleged in the petition of plaintiffs in the court below, the Interstate Commerce Commission made a finding and report, which was duly filed, ordering the said \$2.00 rate on pyrites cinder to be reduced to a rate not exceeding \$1.45 per gross ton for the carriage thereinbefore named, but refused to award reparation to the plaintiffs; a certified copy of which finding, with the order of the Commission, is attached and made part of the petition and statement of claim of the plaintiffs. It is then alleged by plaintiffs that the defendant companies duly complied with this order of the Interstate Commerce Commission, and on or before February 25, 1909, established, and put in effect, and now have in effect, the aforesaid reduced transportation rate. It is further alleged that on May 9, 1909, the plaintiffs duly filed with the Interstate Commerce Commission a motion for a rehearing on the question of reparation alone, which motion was granted, and notice of the granting of the same given to all parties, who appeared at the taking of additional testimony by the plaintiffs; that after hearing and argument, the Interstate Commerce Commission, on June 2, 1910, made a finding and ordered the defendant companies to make reparation to the petitioners, specifying the amount to be refunded in each case, a certified copy of the report, conclusions, and order of the Commission on the rehearing being attached as an exhibit to the petition and statement of plaintiffs in the court below. The plaintiffs aver

that a true copy of the aforesaid order of the Commission, dated June 2, 1910, was duly served upon the defendant companies, and demand made that they should pay to the petitioners the sum claimed in their petition and set forth in the aforesaid order of the Commission, but that said defendant companies have wholly failed, neglected, and refused to pay the same, etc.

Upon the facts thus alleged, the plaintiffs aver in their petition and statement of claim in the court below, that they are lawfully and legally entitled to receive and recover from the said defendant companies the several amounts of money set forth, as and for damages and reparation, in accordance with the said order of the Interstate Commerce Commission, dated June 2, 1910.

Section 14 of the original Interstate Commerce Act provided that in an investigation made by the Commission, it shall be its duty to make a report in writing, which shall include the findings of fact upon which the conclusions of the Commission are based, together with its recommendation as to what reparation, if any, should be made to the parties found to have been injured, "and such findings so made shall thereafter, in all judicial proceedings, be deemed prima facie evidence as to each and every fact found." Section 16 provided for the refusal or neglect "to obey \* \* \* any lawful order or requirement of the Commission," by authorizing the Commission and the party interested in such order or requirement, to apply in a summary way to a Circuit Court of the United States *sitting in equity*, and empowering such court, as a court of equity, to hear and determine the matter, on notice to the common carrier complained of, "in such manner as to do justice in the premises," with full power to conduct all such inquiries as the court may think needful to enable it to form a just judgment in the matter, "and on such hearing \* \* \* the re-

port of said Commission shall be prima facie evidence of the matters therein stated." And it is provided that, if it be made to appear to the court "that the *lawful order or requirement* of said Commission, drawn in question, has been violated or disobeyed," the court may issue a "writ of injunction or other proper process, mandatory or otherwise," to restrain the common carrier from further violation or disobedience of the order or requirement of the Commission, and enjoining obedience to the same, with power to issue writs of attachment or other process incident or applicable to writs of injunction or other proper process, mandatory or otherwise, against such common carrier. (The italics here, as elsewhere, are ours.)

It seems clear from these sections of the Act of 1887, as they originally stood, that Congress had not contemplated a distinction between reparation cases and other cases in which the order of the Commission was not complied with. Circuit Courts were vested with jurisdiction to entertain the complaint of a person interested, that an order had not been complied with, and to hear and determine the matter as courts of equity, giving the redress peculiarly appropriate to equitable jurisdiction, and for that purpose, all the findings of fact by the Commission, as well as all the evidence taken before the Commission, as set forth in the record, were before the court. As all the proceedings for the enforcement of the legal orders of the Commission were solely in equity, a difficulty was soon recognized in reparation cases. It is one thing to enforce by injunction or mandatory process the lawful ministerial order of the Commission, as to things to be done or not to be done in futuro by defendant carriers in the conduct of their business, and quite another thing to enforce an order for the payment of damages by such carriers for a past vio-

lation of law. The claim for such damages, as said by the Commission in *Heck & Petree v. Railroad Co.*, 1 Interst. Com. Com'n R. 775, "presents a case at common law in which the defendants are entitled to a jury trial," under the seventh amendment to the Constitution. As the statute provided for no trial by jury in the suits to enforce such awards, the Commission repeatedly held that it could make no award of damages in such case, for the reason that the defendants were entitled to have the amount assessed by a jury.

This state of things undoubtedly brought about the amendment to section 16 of the original Act, by the Act of March 2, 1889. By this amendment, Congress recognized the propriety of the suggestion made by the Commission, and added to section 16 of the original Act, the following:

"If the matters involved in any such order or requirement of said Commission are founded upon a controversy requiring a trial by jury, as provided by the seventh amendment to the Constitution of the United States, and any such common carrier shall violate or refuse or neglect to obey or perform the same, after notice, \* \* \* it shall be lawful for any company or person interested in such order or requirement to apply in a summary way by petition to the Circuit Court of the United States sitting as a court of law \* \* \* alleging such violation or disobedience as the case may be; and said court shall by its order then fix a time and place for the trial of said cause. \* \* \* And it shall be the duty of the marshal of the district \* \* \* to forthwith serve a copy of said petition, and of said order, upon each of the defendants, and it shall be the duty of the defendants to file their answers to said petition within ten days. \* \* \* At the trial [of] the findings of fact of said Commission as set forth in its

report shall be prima facie evidence of the matters therein stated."

This amendment, made to preserve the constitutionality of reparation proceedings, left the jurisdiction, in cases not involving reparation, to the Circuit Courts sitting as courts of equity, as originally provided. These cases arise either on a petition by the Commission or party interested, to enforce its order, or on an application for injunction by the party defendant, to restrain its enforcement. In either case, the entire record is before the court, and it can examine all the evidence before the Commission, or evidence in addition thereto, to determine the question of the *legality* of the order. The making of such an order is a ministerial function, though *quasi* judicial in the sense that it must be made in the course of an orderly procedure, in which the parties interested may be fairly heard and evidence fairly considered. These fundamental conditions appearing, the order is "*lawful*," and must be obeyed and enforced. It is as though Congress had enjoined as a duty the things embraced in such lawful order. It is in this view of a non-reparation case that the finding by the Commission of the reasonableness or unreasonableness of a rate is a finding of an ultimate fact, which will not be disturbed by a court of equity unless the legality of the proceeding in which it is made is successfully attacked.

In such cases, the judicial power of a court of equity is invoked, to enforce, the *lawful* order of the Commission, and involves no controversy requiring a trial by jury. It is the *lawful* order, *qua* order, of the Commission, as an administrative body, that is to be enforced; whereas, in reparation cases, there is a controversy at common law as to whether the damages awarded by the Commission or any damages are recoverable, and the mere order of the Commission, as we shall see, only



figures in the case as a necessary condition precedent to the bringing of the action, though the findings of facts by the Commission, as set forth in its report, are prima facie evidence of the matters therein stated. The damages sought are only recoverable by the verdict of a jury and judgment thereon, as in ordinary trials at common law.

Section 14 of the original Act of 1887 is left unchanged by this amendatory Act of 1889. By the Act of 1906 (commonly called the "Hepburn Act") important amendments were made to the Act of 1887, as amended by the Act of 1889. The most important of these amendments was the enlargement of the powers of the Commission, by authorizing them, not only to find the rates of interstate carriers unreasonable or excessive, but to determine and fix and make mandatory what, in the opinion of the Commission, under all the circumstances, would be a reasonable rate. Section 14 was amended so as to read as follows:

"That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made."

The effect of this amendment is, that in *non-reparation cases*, for reasons peculiar to such cases, as above pointed out, the Commission henceforth need make no findings of fact on which it bases its conclusions. In reparation cases, however, it is still bound to make findings of all the facts, which it was its duty to make before the amendatory Act of 1906; not merely the facts relating to petitioner's particular tonnage and dates of shipment, but also all the facts on which the Commis-

sion based its conclusion as to the propriety of an award of damages.

Section 16 was also amended, so as to make still more clear the distinction between reparation and non-reparation cases. It provides that where, after hearing on a complaint, the Commission should determine that complainant is entitled to an award of damages, under the provisions of the Act, for a violation thereof, it "shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named. If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant \* \* \* may file in the Circuit Court of the United States for the district in which he resides \* \* \* a petition setting forth briefly the *causes* for which he claims damages, and the order of the Commission in the premises. Such suit shall proceed in all respects like other civil suits for damages, except that on the trial of such suit, the findings and order of the Commission shall be *prima facie* evidence of the facts *therein stated*. After other provisions, with which we are not here concerned, the section further emphasizes the distinction between reparation and non-reparation cases, as follows:

"If any carrier fails or neglects to obey any order of the Commission, *other than for the payment of money*, while the same is in effect, any party injured thereby, or the Commission in its own name, may apply to the Circuit Court in the district where such carrier has its principal operating office, \* \* \* for an enforcement of such order. Such application shall be by petition, which shall state the substance of the order and the respect in which the carrier has failed of obedience, and shall be served upon the carrier in such manner as the court may direct, and the court shall prosecute such in-

quiries and make such investigations, through such means as it shall deem needful in the ascertainment of the facts at issue or which may arise upon the hearing of such petition. If, upon such hearing as the court may determine to be necessary, it appears that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction, or other proper process, mandatory or otherwise," etc.

As we have remarked, section 14, as amended by the Act of 1906, relieved the Commission of the duty of stating specifically the findings of fact on which it based its conclusions in cases where damages were not awarded, and it is simply required to make a report, which shall state the conclusions of the Commission, together with its decision, order or requirement in the premises. The District Court, as a court of equity, will consider the order it is asked to enforce as valid, when it appears to have been made in the course of a regular hearing and to be founded upon evidence and facts proved. Much light is thrown upon a situation of this kind by the recent decision of the Supreme Court in the non-reparation case of *Interstate Commerce Commission v. Louisville & Nashville R. R. Co.*, 227 U. S. 88, 33 Sup. Ct. 185, 57 L. Ed. —. Mr. Justice Lamar, delivering the opinion of the court, said:

"In a case like the present the courts will not review the Commission's conclusions of fact (*Int. Com. Comm. v. Dal.*, etc., *Ry.*, 220 U. S. 251 [31 Sup. Ct. 392, 55 L. Ed. 448]), by passing upon the credibility of witnesses or conflicts in the testimony. But the legal effect of evidence is a question of law. A finding without evidence is beyond the power of the Commission. An order based thereon is contrary to law, and must, in the language of the statute, 'be set aside by a court of com-

petent jurisdiction.' 36 Stat. 551." *So. Pac. Co. v. Int. Com. Comm.*, 219 U. S. 433, 31 Sup. Ct. 288, 55 L. Ed. 283.

So much for the conclusiveness of a decision or order of the Commission in a non-reparation case, where a court of equity is asked to enjoin the enforcement of such decision or order as the valid order of an administrative body. Such an order, if it stands the tests of legality laid down by the Supreme Court in the case above referred to, is conclusive upon a court of equity where such administrative order is sought to be enforced. But it is clear that, in a reparation case, though the award of damages by the Commission, following its finding of fact that a given rate was unreasonable, may be proved as the basis or condition precedent to the institution of the suit for damages authorized by the statute, it is not capable of enforcement as an administrative order, and is not of itself evidence of *liability*, *prima facie* or otherwise, in any judicial proceeding.

The amended Act of 1906, no less than the original Act, or the same as amended in 1889, expressly requires that the report of the Commission "shall include the findings of fact on which the award is made." The Act of 1889 and the Act of 1906 both provide that, where damages are awarded by way of reparation, they can be recovered or enforced only by a suit at common law in a Circuit Court of the United States, requiring a trial by jury. The Act of 1906 makes clear the plenary character of such a suit, by providing that it "shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated." It hardly needs that attention be called to what is so obvious, that both the "findings and order"

are *prima facie* evidence only of the *facts* therein stated. This is very far indeed from declaring that the order itself, awarding reparation, is *prima facie* evidence of damages, or the proper measure thereof.

As to the provisions covering reparation cases, Congress is no longer dealing with those matters which concern the practical management and conduct of the business of carriers and the regulation thereof *in futuro*, in the interests of the public generally, but is conferring a private right of action upon those who have suffered actual damage, by reason of such carriers' violation of some requirement of the Act. The conferring of such right of action, though incident to its power to regulate commerce, is not a regulation thereof. It makes redress of a private injury actually suffered, possible. It concerns the past and not the future conduct of the carrier, and, though this right of action for damages is qualified by making it depend in certain cases upon the precedent award of reparation by the Commission, such award is not of the nature of the administrative functions conferred on that body.

In the case of *Western N. Y. & P. R. Co. v. Penn Refining Co.*, 137 Fed. 343, 70 C. C. A. 23, which was decided with reference to the original Act, as amended by the Act of 1889, we said:

"In proceedings at law under section 16, as amended for the enforcement of an order or requirement of the Commission, the parties are entitled to an impartial trial by jury, so conducted as to accord to them in full measure the enjoyment of their constitutional right. The procedure contemplated by the act and, unless waived, required by the Constitution, is jury trial, accompanied with the usual safeguards furnished by a proper application of the principles of evidence and the proper submission of the case to the jury."

The judgment in this case was affirmed by the Supreme Court, with no criticism of the language quoted. *Penn Refining Co. v. West N. Y. & P. R. R. Co.*, 208 U. S. 208, 28 Sup. Ct. 268, 52 L. Ed. 456.

With this understanding of the true intent and meaning of the Interstate Commerce Act of 1887, as amended in the respects hereinbefore discussed, we may state as conclusions fairly resulting therefrom, the following:

[1] (1) That a suit brought by one in whose favor the Commission has made an award of damages by way of reparation, under the authority of section 16 of the Act, is not a suit on the award, *qua* award, to recover the amount of the same, but a plenary suit for damages actually incurred by the plaintiff, by reason of the violation of the act by the defendant as conclusively found by the Commission.

(2) In the prosecution of such a suit, plaintiff may avail himself, without further proof, of the conclusive administrative finding or order of the Commission that the defendant was guilty of the violation of the act complained of, but must prove the actual damages incurred by him by reason of such violation and for which damages alone the Act makes the defendant carrier liable.

(3) In addition to this advantage given to the plaintiff in the prosecution of such a suit, plaintiff need not examine witnesses or offer other proof, in the first instance, of the facts stated in the findings or order of the Commission, such findings or order being made *prima facie* evidence thereof.

[2] (4) Such suit is expressly required by the Act to be proceeded in "like other civil suits for damages," which can mean nothing less than that the "parties are

entitled to an impartial trial by jury, so conducted as to accord to them in full measure the enjoyment of their constitutional right."

(5) This essential right is not invalidated or impaired by the qualification of the rules of evidence, to the effect that "the findings and order of the Commission shall be prima facie evidence of the facts therein stated."

(6) By reason of this qualification, the plaintiff may now avail himself of a new method to get these facts before the jury, and that method is this: There must be found somewhere and in some form sufficiently clear and sufficiently definite findings of the Commission, in which the needful facts are stated and by which the defendant is thus given due notice of the facts to be urged against him, so that he may, if he can, controvert their prima facie effect.

[3] (7) It does not necessarily follow, from a finding by the Commission that a given tariff rate established by the defendant is unreasonable and that a lower rate fixed by the Commission is reasonable, that plaintiff has suffered pecuniary damage, by reason of the exaction by defendant of the former rate, or, if any such damage has been suffered, that the difference between the rate abrogated and the lower rate established is the measure of such damage. If any damage is shown, it may be either greater or less than such difference.

(8) The authorization of a suit for damages by one claiming to be injured by a specific violation of the Act by a carrier, is not the imposition of a penalty in addition to the fines imposed and made payable to the government for every specific violation of a requirement of the Act, but a remedy for the recovery of damages actually in-



curred by a private person because of the wrongful act of the carrier.

We turn to the consideration of the case, as presented in the record before us. The plaintiffs, in their petition to the court below, set forth the fact of their application to the Interstate Commerce Commission, charging against the defendant companies the exaction of an excessive and unreasonable rate per ton for the transportation of pyrites cinder between points in the state of New York and the states of Pennsylvania and New Jersey. They then set forth the statements made by the Commission in two several reports, in the first of which, dated January 5, 1909, the Commission finds the rate as complained of unreasonable, and directs that it thereafter be reduced to a rate named, but declines to award damages by way of reparation. They also allege that the defendant companies duly complied with the aforesaid order of the Commission within the time limited therefor. The petition then states that on May 8, 1909, the petitioners filed a motion with the Commission for a rehearing, on the *question of reparation alone*, notice of the granting of which was duly given to all parties who appeared at *the taking of additional testimony by the petitioners*, and that after hearing and argument, the Commission made a report, awarding damages as prayed for. The petition then concludes with a statement of the demand made from the defendant companies for the payment of the sum awarded, and of their refusal to pay the same.

At the trial, the plaintiffs offered in evidence these reports and orders of the Interstate Commerce Commission, as *prima facie* evidence of the facts found therein. After objection by counsel for the defendant companies, the said reports and orders of the Commission were admitted for what they were worth as findings of fact.

Except that one witness was produced to prove that the award of the Commission had not been paid by the defendants, these two reports and orders constituted the only evidence produced by the plaintiffs, and after their admission by the court, plaintiff rested their case. No evidence was offered by the defendants.

The first report, and the order made thereon January 5, 1909, is as follows:

"This complaint involves the reasonableness of the rate of \$2 per gross ton on pyrites cinder over the lines of the defendant companies from Buffalo, N. Y., to points in the states of Pennsylvania and New Jersey.

"Iron pyrites is a high grade ore containing a large percentage of both sulphur and metallic iron. It is imported, chiefly from Spain, by fertilizer and chemical works located in this country. At these works this ore is burned in specially constructed furnaces, and from the arising sulphuric fumes sulphuric acid is obtained. The resultant product, pyrites cinder, contains approximately 60 per cent. of iron and a small residue of sulphur, usually from 1 to 3 per cent., the amount of residue determining the value of cinder to the iron manufacturer, as the presence of sulphur lessens the value of iron ore. This pyrites cinder, the rate upon which complainants claim to be excessive, is shipped to blasting furnaces in Pennsylvania and New Jersey, where the iron is subtracted and used in the manufacture of pig iron. It is alleged by the complainants that pyrites cinder being a low grade commodity, valued at about \$1 per gross ton at Buffalo, is unable to move at the \$2 per ton rate; the output at the chemical works at Buffalo being from 20,000 to 25,000 tons per year, only one-quarter of which is sold. Pyrites cinder is also produced at chemical works in Bayonne, N. J., where it is valued at \$2 per ton, the difference between the value at Buffalo and the

value at Bayonne being, it is claimed, accounted for because of the difference in freight rate to points of destination in New Jersey and Pennsylvania. This fact is emphasized by complainants that the iron pyrites bears a rate from New York, Philadelphia and Baltimore to Buffalo of but \$1.40 per ton, while the pyrites cinder for a return haul of but a part of the distance bears a rate of \$2 per ton, the cheaper commodity for a shorter haul being charged a greater amount than the higher grade commodity for a longer haul.

"The contention of the defendants by way of answer is that pyrites cinder should take a higher rate than iron ore between the same points, owing to the longer time consumed in loading the former than the later, and because iron ore is consumed in greater quantities than pyrites cinder. It appears that it does in fact take much less time to load iron ore than pyrites cinder, and a car load of iron ore is slightly heavier than a load of pyrites cinder. The rate on iron ore is \$1.45 per ton to points of destination carrying a \$2 rate on pyrites cinder.

"We are of the opinion that the rate on pyrites cinder should not exceed the rate on iron ore from Buffalo, and an order will be made accordingly. Reparation will not be awarded."

The second report and order of June 2, 1910, made upon a rehearing and investigation upon the question of reparation alone, as applied for by the plaintiffs, is as follows:

"In the report made by this Commission following an inquiry into the reasonableness of the rate of \$2 per gross ton exacted by the defendants for the transportation of pyrites cinder from Buffalo, N. Y., to points in the states of Pennsylvania and New Jersey, the rate was found excessive and the defendants were ordered to establish a rate not to exceed that contemporaneously

applying on shipments of iron ore between the same points. Reparation was denied. *Naylor & Co. v. L. V. R. R. Co.*, 15 Interst. Com. Com'n R. 9.

"Pursuant to the Commission's order the defendants reduced the rate on pyrites cinder to \$1.45, the rate on iron ore. The complainant thereupon filed a motion for a rehearing upon the question of reparation, and after consideration by the Commission the motion was granted. *Additional evidence* was taken and the parties were heard in oral argument.

"We now find that the rate of \$2 per gross ton, assessed and collected by the defendants on the shipments giving rise to complaint, was unjust and unreasonable to the extent that it exceeded the subsequently established rate of \$1.45 per gross ton. Complainant is entitled to reparation on all shipments moving within the period of the statute of limitations."

Then follow the specific awards against the different defendant companies.

Plaintiffs contend that this hearing and investigation applied for by plaintiffs on the question of reparation alone, though had more than a year after the former report denying reparation, was a rehearing of the original application to the Commission, and that therefore the first report and such findings as were contained therein were part of the second report. While this may in some respects be true, it is also true that reparation had been denied at the first hearing, and that the second hearing on the question of reparation alone was a distinct proceeding on that issue. That it was so, appears by the statement of the Commission itself, that "additional evidence was taken and the parties were heard in oral argument." It does not follow that, because a given rate is found to be excessive and unreasonable, and is ordered to be discontinued and another rate estab-

lished, the complainant has suffered or is entitled to damages by way of reparation. Notwithstanding such a finding and order, there are many circumstances and considerations, such as the relations between the parties, want of knowledge by the defendant companies of the facts bearing on the question of reasonableness, lack of intention to violate the law in that respect, or lack of proof of actual damage suffered by plaintiffs, which might influence the Commission or a jury in coming to the conclusion that the applicant was not entitled to an award of reparation or damages. And this was the conclusion of the Commission at the first hearing. The fact that, while pyrites cinder was paying \$2.00 per gross ton, from Buffalo, New York, to points in Pennsylvania and New Jersey, iron ore was being charged \$1.45 per ton, from the ports of Philadelphia and Baltimore to Buffalo, and that such difference was unreasonable, was not sufficient at the first hearing to convince the Commission that the applicant had suffered or was entitled to pecuniary damages. As said by the Supreme Court in *Parsons v. Chicago & N. W. Ry.*, 167 U. S. 447, 17 Sup. Ct. 887, 42 L. Ed. 231:

"The only right of recovery given by the Interstate Commerce Act to the individual, is to the persons or person injured thereby for the full amount of damages sustained in consequence of any of the violations of the provisions of this Act; and before any party can recover under the Act, he must show, not merely the wrong of the carrier, but, that that wrong has operated to his injury."

And so we find that, in the second report in which reparation was awarded, the Commission states that additional evidence was taken and the parties were heard in oral argument. What this additional evidence was, or what were the facts which the Commission found,

established by it, is nowhere stated in the report. So that we have nothing in the way of the findings of facts required by the statute upon which the award of reparation by the Commissioners was made. The second report does not state that reparation was awarded upon any supposed findings of fact in the first report. Nor could it well have been, because the Commission, though finding the charge made by the defendant companies to be unreasonable, distinctly declined to find that plaintiffs were entitled to reparation. It is reasonable to conclude, therefore, that the award of reparation was made upon the facts established by the additional evidence. Section 14 of the Interstate Commerce Act, as amended, is peremptory in its requirement that in such case the Commission should include in their report the findings of fact on which their award was made.

But, even if the reference to the first report were sufficient to incorporate all its statements and supposed findings of fact in the second report, yet the facts of which those statements or findings are the *prima facie* evidence, are wholly insufficient to support the plaintiffs' claim for damages.

As the Commission in its first report had refused reparation, it was relieved by the amendment of 1906 from the duty of including in its report the findings of fact on which its conclusion as to the unreasonableness of the rate was based. Such findings are not to be expected in that report. The statements in the opinion that most nearly approach in character findings of fact, are that iron pyrites is a high grade ore containing a large percentage of both sulphur and metallic iron; that it is imported chiefly from Spain by fertilizer and chemical works; the ore is burned at these works, and from the arising sulphuric fumes, sulphuric acid is obtained; that the resultant product, pyrites cinder, con-

tains approximately 60 per cent. of iron and a small residue of sulphur, usually from 1 to 3 per cent., the amount of residue determining the value of the cinder to the iron manufacturer, as the presence of sulphur lessens the value of iron ore; that this pyrites cinder is shipped to blast furnaces in Pennsylvania and New Jersey, where the iron is subtracted and used in the manufacture of pig iron.

Though these facts be taken by the jury as *prima facie* true, they clearly have no relevancy to the demand of the plaintiffs for damages. What follows is a summary by the Commission of the contentions of the plaintiffs and the defendant companies, without any finding by the Commission as to the facts embodied therein, except that, in stating the contention of the defendant companies, it does affirm some of the facts upon which it is founded.

But for the reasons already stated, even if these statements of the contentions of the parties are to be regarded as findings of fact, we are still of opinion that, however they may have justified the finding of the Commission as to the unreasonableness of the charge on pyrites cinder, and the order for its reduction to the rate charged on iron ore, they do not justify the jury in awarding damages to the plaintiffs. It does not at all follow, as plaintiffs seem to be under the impression that it does, that because the Acts make certain findings of fact *prima facie* evidence of such facts, it also determines their probative force.

Counsel for plaintiffs apparently does not much rely, if at all, upon these statements in the first report of the Commission, to which we have referred, as findings of fact sufficient for his purpose. The case was apparently tried in the court below and has been argued here by counsel for the plaintiffs, on the theory that the Com-



mission having found as a fact the rate exacted by the carriers was unreasonable, that that fact, together with the award of reparation, as sets forth in the reports and orders of the Interstate Commerce Commission, must stand as *prima facie* proof of plaintiffs' case before the jury. As a matter of fact, that was plaintiffs' claim in their petition. What we have already said, should be sufficient to expose the fallacy of that theory. It is only as to the *facts* contained in the order that the order is made *prima facie* evidence. But the orders themselves of the Commission are not *prima facie* evidence as to the question of liability in a judicial proceeding. As well said by Judge McCall in Darnell-Taenzler Lumber Company v. So. Pac. Co. (C. C.) 190 Fed. 659:

"This must be so for two reasons: First, if the Congress intended that the order making the award should be taken as *prima facie* evidence of the liability of the carrier, then it would seem that it did a useless thing in requiring the Commission by the terms of the Act to make findings of fact in cases wherein awards for damages are allowed. \* \* \* In such a case the court would be at a loss to know whether it would be controlled by the facts reported or the order made by the Commission in pronouncing its judgment."

But, upon this theory, the case was actually submitted to the jury, and presumably upon that theory determined by them. We find that the court below submitted the case to the jury, as follows:

"These amounts were awarded by the Commission against these railroads in favor of the plaintiff.

"The plaintiff has submitted to you evidence to establish the fact that these railroads have not, up to this time, paid these awards. They also submit to you the reports of the Interstate Commerce Commission, for the purpose of showing that that finding was made by

the Commission, and that these awards in favor of the plaintiff were made against these railroad companies. This same Act of 1887, the Interstate Commerce Act, section 16, says that such suit shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and the order of the Commission shall be prima facie evidence of the facts therein stated. You will notice that the Act of Congress says that the findings of the Commission shall be prima facie evidence of the facts therein stated. In the report, the facts stated are, as I have read them to you, that is, the Commission finds that \$2.00 a ton is an excessive charge on this one, and it is excessive to the extent of the difference between \$1.45 per ton and \$2.00 pr ton; and then it proceeds to state the number of tons that each of the railroads carried for the plaintiff at that excessive amount, and awards an amount to the plaintiff equal to the amount of the excessive charge on the number of tons carried. That is to say, it has found that these railroads owe this plaintiff the amount of money stated, and found in the report, because of the fact that the railroads charged them excessive freight. The act says that that shall be prima facie evidence. That means that it shall be established, prima facie, the facts therein contained unless contradicted or explained. The defendants have offered no evidence whatever, and leave the record as to the evidence the same as it was when the plaintiff closed its case. You have nothing, then, before you except that the Interstate Commerce Commission found that these railroads owe this plaintiff so much money, and that it has not yet been paid. The Act says that that finding of the Commission shall be prima facie evidence of the facts, and you will therefore say whether or not the plaintiff is entitled to re-

cover the amount of money claimed against each railroad respectively."

We have quoted all that was said in submitting the case to the jury, that we may do no injustice to the learned and usually careful judge who delivered the charge. It is impossible to say that the jury were not led to believe that they were justified in considering that the order of the Commission, that these defendant companies should pay the plaintiffs so much money, was *prima facie* evidence of the defendants' liability therefor.

Since the argument and determination of this case, the opinion of the Supreme Court in *Pennsylvania Railroad Co. v. International Coal Mining Co.*, 230 U. S. 184, 33 Sup. Ct. 893, 57 L. Ed. —, has been delivered, and by it the pivotal question involved in this case has, we think, been authoritatively and finally disposed of.

In that case, the Coal Mining Company had sued the Pennsylvania Railroad Company, as a carrier in interstate commerce, for \$37,268.00, being the difference between the published tariff rates paid by the plaintiff and lower rates resulting from rebates from the published rates allowed other coal dealers making like shipments over the same road, from the same point to the same destination.

It was objected by the defendant that, inasmuch as the suit was instituted by plaintiff in the court below, without first having made complaint to the Interstate Commerce Commission, and without any finding by that body that the facts stated constituted a rebate or discrimination prohibited by the Act, the court had no jurisdiction to entertain such suit. In disposing of this

objection and sustaining the jurisdiction of the court, Mr. Justice Lamar, in delivering the opinion of the court, said:

"The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon railroad and shipper alike. If, as a fact, the rates were unreasonable, the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former, the right to apply to the Commission for reparation. In view of this imperative obligation to charge, collect, and retain the sum named in the tariff, there was no call for the exercise of the rate-regulating discretion of the administrative body to decide whether the carrier could make a difference in rates between free and contract coal. For whether it could do so or not, the refund of any part of the tariff rate collected was unlawful. It could not have been legalized by any proof, nor could the Commission by any order have made it valid. The rebate being unlawful, it was a matter where the court, without administrative ruling or reparation order, could apply the fixed law to the established fact that the carrier had charged all shippers the published or tariff rate, and refunded a part to a particular class. This departure from the published tariff was forbidden, and section 8 (24 Stat. 382) expressly provided that any carrier doing any act prohibited by the statute should be 'liable to the person \* \* \* injured thereby for the full amount of damages sustained in consequence of any such violation, \* \* \* together with reasonable \* \* \* attorneys' fee.'

"2. But although this suit was brought to enforce a cause of action given by this section to any person injured, it is a noticeable fact that in its pleading the

plaintiff does not claim to have been damaged, and there is neither allegation nor proof that it suffered any injury. It contends, however, that this was not necessary, for the reason that, as matter of law, it was entitled to recover as damages the same rate per ton on all plaintiff's shipments as had been rebated any other person, on any of his tonnage, shipped at the same time, over the same route."

The question here raised is in principle precisely that raised in the present case. Here, as there, in its pleading the plaintiff does not claim specific damages but contends that, as matter of law, it was entitled to recover, as damages, the difference between the tariff rate charged and the reasonable rate established by the Commission. No distinction in principle can be predicated upon the fact that, in the case under consideration by the Supreme Court, the action was based directly upon an alleged violation of section 2 of the Act, prohibiting the giving by a carrier of rebates, etc., as therein defined, and as to which no complaint to the Commission was required before bringing a suit. Nor can any distinction be based upon the bringing of that suit under section 8, instead of under section 16.

In the present case, the action is brought under the provisions of section 16, authorizing a suit for damages, after complaint to and an order made by the Interstate Commerce Commission, but it is a private suit for damages, and not for a penalty, and, as expressly enjoined by the Act, is to be proceeded in "in all respects like other civil suit for damages." Otherwise, it would not comply with the mandate of the seventh amendment to the Constitution. There can be no question, therefore, but that what is said by the Supreme Court in regard to the nature of the damages recoverable in a suit before it, is

applicable to the damages sought to be recovered in this suit.

We again quote somewhat at length the language of Mr. Justice Lamar in this respect. Referring to the case of *Parsons v. Railway*, 167 U. S. 460, 17 Sup. Ct. 892, 42 L. Ed. 231, and quoting therefrom, with approval, the following language:

"Before any party can recover under the Act, he must show not merely the wrong of the carrier, but that that wrong has in effect operated to his injury."

In the case before us, the wrong of the carrier is conclusively shown by the administrative finding of the Commission. He then says:

"Congress had not then and has not since given any indication of an intent that persons not injured might, nevertheless, recover what, though called damages, would really be a penalty, in addition to the penalty payable to the government. \* \* \*

"The statute gives a right of action for *damages* to the *injured* party, and by the use of these legal terms clearly indicated that the damages recoverable were those known to the law and intended as compensation for the injury sustained. It is elementary that in a suit at law both the fact and the amount of the damage must be proved. And although the plaintiff insists that in all cases like this the fact and amount of the pecuniary loss is matter of law, yet this contention is not sustained by the language of the act, nor is it well founded in actual experience, as will appear by considering several usual and every-day instances suggested by testimony in this record. For example:

"If plaintiff and one of the favored companies had both shipped coal to the same market on the same day, the rebate on contract coal may have given an advantage which may have prevented the plaintiff from selling,

may have directly caused it expense, or may have diminished or totally destroyed its profits. The plaintiff, under the present statute in any such case being then entitled to recover the full damages sustained; but the plaintiff may have sold at the usual profit all or a part of its 40,000 tons at the regular market price, the purchaser, on his own account, paying freight to the point of delivery. In that event not the shipper, but the purchaser, who paid the freight would have been the person injured, if any damage resulted from giving rebates. To say that the seller and buyer, shipper and consignee, could both recover, would mean that damages had been awarded to two where only one had suffered; \* \* \* for it [the plaintiff] argues that, whenever it showed that a lower rate had been charged on contract coal sold in 1899, it was entitled to recover the same rate on shipments made by it to the same place on the same day in 1901, even though there had been no competition in the two sales, and without proof that there had been any fall in market prices, diminution in its profits, decrease in its business, or increase in its expenses. It claimed that it was a mere matter of mathematics, and that for every rebate on contract coal, plaintiff was entitled to a like reduction on every ton of its coal without further proof of damage or injury.

"6. To adopt such a rule and arbitrarily measure damages by rebates would create a legalized, but endless, chain of departures from the tariff; would extend the effect of the original crime; would destroy the equality and certainty of rates; and, contrary to the statute, would make the carrier liable for damages beyond those inflicted, and to persons not injured. The limitation of liability to the persons damaged, and to an amount equal to the injury suffered, is not out of consideration for the



carrier who has violated the statute. On the contrary, the Act imposes heavy penalties, independent of the amount of rebate paid, and as each shipment constitutes a separate offense, the law, in its measure of fine and punishment, is a terror to evil doers. But for the public wrong and for the interference with the equal current of commerce these penalties or fines were made payable to the government. If by the same act a private injury was inflicted, a private right of action was given. But the public wrong did not necessarily cause private damage, and when it did, the pecuniary loss varied with the character of the property, the circumstances of the shipment, and the state of the market; so that, instead of giving the shipper the right to recover a penalty fixed in amount or measure, the statute made the guilty carrier liable for the full amount of damages sustained—whatever they might be, and whether greater or less than the rate of rebate paid.

"7. This conclusion, that the right to recover is limited to the pecuniary loss suffered and proved, is demanded by the language of the statute, the construction put upon it years ago in the Parsons Case, and is the view taken in the only other case we find in which this question, under the Act to Regulate Commerce, has been construed. In *Knudsen v. Michigan Central R. R.*, 148 Fed. 974 [79 C. C. A. 52], it was said by the Circuit Court of Appeals for the Eighth Circuit that to 'support a recovery under this section there must be a showing of some specific pecuniary injury. A cause of action does not necessarily arise from those acts or omissions of a common carrier that may subject it to a criminal prosecution by the government or to corrective or coercive proceedings at the instance of the Commission.'"

[4] In conclusion, we are of opinion, first, that there were no sufficient findings of fact in these reports of the Commission, as required by the statute; second, that if any of the statements in the first report could properly be considered as findings of fact, within the meaning of the statute, so as to make such findings *prima facie* evidence of the facts found, they were not sufficient to support the plaintiffs' claim or make out even a *prima facie* case for damages. The plaintiffs were not bound to rely upon *prima facie* evidence. The whole field of inquiry was open to them,—the production of such testimony as could be found bearing upon the issue, and notably the additional evidence referred to by the Commission in its second report. Failing to produce evidence *prima facie* sufficient to show actual damage suffered, and the amount thereof, the defendants were not put to a reply, and the plaintiffs must suffer the consequence of their default.

We think for the reasons stated, the assignment of error, based on the exception to the refusal of the court to give binding instructions in favor of the defendant companies, must be sustained, and the judgment of the court below reversed. And it is so ordered.

OCT 7 1914  
JAMES D. MAHER  
CLERK

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IN THE  
**Supreme Court of the United States.**

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OCTOBER TERM, 1914  
No. 435.

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HENRY E. MEEKER,  
*Petitioner,*  
vs.

LEHIGH VALLEY RAILROAD COMPANY,  
*Respondent.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE THIRD CIRCUIT.

---

**BRIEF FOR LEHIGH VALLEY RAILROAD  
COMPANY, RESPONDENT.**

---

EDGAR H. BOLES,  
*Solicitor for Respondent.*

JOHN G. JOHNSON,  
FRANK H. PLATT,  
GEORGE W. FIELD,  
*Counsel.*



**In the Supreme Court of the United States,**

OCTOBER TERM, 1914.

---

HENRY E. MEEKER,  
Petitioner,

against

LEHIGH VALLEY RAILROAD COM-  
PANY,

Respondent.

---

No. 435.

**ON WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE THIRD CIRCUIT.**

**BRIEF FOR RESPONDENT.**

**Statement.**

This action was brought to recover \$12,907.18, with interest (R. 6). The amount covers a claim made by Mr. Meeker as a shipper of anthracite coal.

From July 17, 1907, to February 2nd, 1910, Mr. Meeker shipped anthracite coal from the Wyoming region of Pennsylvania to tidewater at Perth Amboy, New Jersey, over the Lehigh Valley Railroad. He paid tariff rates.

He now claims that during said period he paid as freight charges \$136,663.41; that the charges were excessive; that the reasonable charge for the services would not have exceeded \$125,849.81. He claims the difference, namely, \$10,813.60 as excessive charges (R. 10). Interest upon the various amounts going to make up the \$10,813.10 amounted as of July 15th, 1912, to \$12,907.18, which is the amount sued for (R. 6).

Action was commenced September 3, 1912, by the filing of the petition (R. 1). On October 5, 1912, defendant filed its plea of not guilty (R. 45).

The issues were tried before Judge Holland and a jury November 12, 1912 (R. 46). A verdict was rendered for the plaintiff for the full amount with interest (R. 63).

December 19, 1912, judgment was entered for \$13,161.78 (R. 64). The court also ordered that plaintiff's counsel be allowed \$2,500 as counsel fee for his services in a certain proceeding before the Interstate Commerce Commission; and a further sum of \$2,500 for services in this action (R. 63).

Thereupon defendant filed its bill of exceptions, assignments of error, and its petition for a writ of error (R. 63-65). Upon order (R. 65) the writ of error was issued December 30, 1912 (R. 2).

Mr. Meeker is a coal dealer. He purchased anthracite coal in the Wyoming region of Pennsylvania and shipped it to tidewater at Perth Amboy, New Jersey (R. 47). He shipped his coal over the Lehigh Valley Railroad (R. 47).

April 13, 1910, Mr. Meeker filed a complaint with the Interstate Commerce Commission against the Lehigh Valley Railroad Company (R. 5). In his complaint he

asked the Commission to compel the Railroad to reduce its rates on anthracite coal from the Wyoming region in Pennsylvania to Perth Amboy, New Jersey. The rates then in effect (April 13, 1910) were \$1.55 per gross ton of 2,240 pounds for prepared sizes of coal (including egg, stove and chestnut), \$1.40 per gross ton on pea coal, \$1.20 per gross ton on buckwheat coal, and \$1.10 per gross ton on sizes of anthracite coal smaller than buckwheat coal (R. 48). He asked that all these rates be reduced to one dollar per ton.

In his complaint he also demanded reparation based upon shipments made from time to time between July 17, 1907 and February 2, 1910. He claimed that between July 17, 1907 and February 2, 1910, he had made various shipments from the Wyoming region of Pennsylvania to Perth Amboy, New Jersey, and had paid at tariff rates \$136,663.41 (R. 10). He claimed as reparation the difference between this amount and what the charges would have amounted to at the rate of \$1.00 per ton.

May 7th, 1912, the Commission submitted a report, at the conclusion of which it stated:

"On basis of our decision in No. 1180, and upon consideration of the evidence submitted at the hearing of the present case regarding the amount of reparation due complainant, we now find that the rates exacted by defendant for the transportation of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., during the period from April 13, 1908, to April 13, 1910, were unreasonable to the extent that they exceeded rates of \$1.40 per gross ton on prepared sizes, \$1.30 on pea and \$1.15 on buckwheat; that complainant shipped from said point of origin to said destination during the period above set forth 46,772.02 tons of coal of prepared sizes, 26,972.06 tons of pea



coal and 22,004.09 tons of buckwheat coal; that complainant paid charges thereon, amounting to \$136,663.41, at the rates herein found to have been unreasonable, and was damaged to the extent of the difference between the amount which he did pay and \$125,849.81, the amount which he would have paid at the rates above found reasonable; and that he is, therefore, entitled to an award of reparation in the sum of \$10,813.60, with interest amounting to \$1,526.53 upon the individual charges comprising same sum from the dates of payment thereof to September 1, 1911, together with interest on said sum of \$10,813.60 from the 1st day of September, 1911" (R. 10).

The report from which the above paragraph is quoted refers to two proceedings before the Commission, a former proceeding brought by Henry E. Meeker and Caroline H. Meeker, as co-partners, and a later proceeding brought by Henry E. Meeker (R. 8). The decision in "No. 1180," referred to in the paragraph quoted above is the report of June 8, 1911 (R. 12) in the former proceeding, brought by Henry E. Meeker and Caroline H. Meeker as co-partners.

As appears from the report of May 7, 1912, the first proceeding covered reparation claims during the period from November 1, 1900, to July 17, 1907 (R. 9). The second proceeding, in which Henry E. Meeker was complainant and which is the proceeding referred to in the petition in this suit, covered reparation claims beginning with July 17, 1907 (R. 9). In the report of May 7, 1912, the Commission stated:

"With the exception of the reparation features, the issues involved in No. 3235 have been passed upon by the Commission in No. 1180. The latter case covered the period from November 1, 1900, to July 17, 1907, while the instant case is designed to secure reparation

upon shipments which moved between July 17, 1907, and April 13, 1910. The petition in the present case, therefore, resolves itself into a prayer for reparation on shipments moving subsequent to the period covered by the original report, on basis of the conclusions announced in that report. In No. 1180 the complaint attacked the reasonableness of rates charged by defendant for the transportation of various sizes of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., and asked reparation. On June 8, 1911, the Commission rendered its decision in that case. The petition in the present case was filed on April 13, 1910, or about a year prior to our decision in No. 1180. As before stated, it attacks the same rates that were found unreasonable in No. 1180, and asks reparation on shipments moving from July 17, 1907, to April 13, 1910" (R. 9).

The petition in the second proceeding before the Commission was filed by Mr. Meeker on April 13, 1910 (R. 5), at a time when the first proceeding was still pending undetermined before the Commission.

Section 16 of the Act to Regulate Commerce provides that claims for reparation must be filed with the Commission within two years after the cause of action accrues. The second proceeding was brought to prevent the two year limitation from running against claims which accrued after the first petition was filed, and which, therefore, were not covered by the first petition.

As stated, the second complaint covers the period from July 17, 1907, to April 13, 1910, but the two year limitation applied to cut off claims which accrued between July 17, 1907, and July 17, 1908 (R. 10).

On May 7, 1912, the Commission also handed down its order, in which it stated:

*"It is ordered,* That defendant Lehigh Valley Railroad Company be, and it is hereby authorized and required to pay unto complainant, Henry E. Meeker, on or before the 15th day of July, 1912, the sum of \$10,813.60, with interest at the rate of 6 per cent per annum, amounting to \$1,526.53 upon the various individual charges comprising said sum, from the dates of payment thereof to September 1, 1911, as itemized in complainant's Exhibit 1, together with interest at the rate of 6 per cent per annum on said sum of \$10,813.60 from September 1, 1911, as reparation for unreasonable rates charged for the transportation of various shipments of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., which rates so charged have been found by this Commission to have been unreasonable, as more fully and at large appears in and by said report of the Commission" (R. 11, 12).

In making its order (R. 11) the Commission sought to comply with section 16 of the Act to Regulate Commerce, which provides: "That if, after hearing on a complaint made as provided in section 13 of this act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this act, for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named."

Section 16 also provides that if the carrier does not comply with the order the complainant may file in the circuit court a petition setting forth his claim and the order of the Commission; and that such suit shall proceed in all respects like other civil suits for damages, except that on the trial the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated. There is a further provision as to costs

and attorney's fees, and the provision that "a petition for the enforcement of an order for the payment of money shall be filed in the Circuit Court \* \* \* within one year from the date of the order and not after."

The order was served upon the defendant railroad (R. 56); and the railroad did not comply with such order for the payment of money within the time limit of the order.

Thereupon Mr. Meeker brought this action in the District Court.

The action was commenced by the filing of a petition on September 3, 1912 (R. 3). This petition makes claim for the amounts awarded by the Commission in its order, which the railroad has refused to pay. Attached to the petition as exhibits are the Commission's report of May 7, 1912, and its order of May 7, 1912, together with a long opinion by the Commission filed June 8, 1911, in the former proceeding brought by Henry E. Meeker and Caroline H. Meeker, as co-partners (R. 8, 11, 12). Also attached to the petition is an order in the former proceeding dated June 8, 1911, which order relates to future rates (R. 44).

The petition in this action alleges that from April 13, 1908, to April 13, 1910, Meeker paid on shipments of coal from the Wyoming region to Perth Amboy tariff rates of \$1.55 per ton for prepared sizes, \$1.40 for pea coal, and \$1.25 for buckwheat coal; that those charges were excessive; that reasonable charges would not have exceeded \$1.40 per gross ton on prepared sizes, \$1.30 on pea and \$1.15 on buckwheat coal (R. 4). The petition claims a recovery of the alleged excessive charges \$10,813.60, which, with interest to July 15, 1912, amounted to \$12,907.18 (R. 3), and demands judgment for said sum of \$12,907.18 with interest from July 15, 1912 (R. 6).

Defendant's plea, filed October 5, 1912, is as follows:

"The defendant, the Lehigh Valley Railroad Company, for a plea in the above stated case pleads Not Guilty; and further pleads the bar of the Statutes of Limitation applicable to the plaintiff's claim; and for further plea in this behalf defendant avers that the Interstate Commerce Commission has no jurisdiction to make the findings and order of reparation which the plaintiff seeks to enforce by this proceeding, and further that there was before the Commission no substantial evidence to sustain said findings and said order" (R. 45).

At the trial the plaintiff put in evidence the report of the Commission dated May 7, 1912, and the reparation order dated May 7, 1912. (Said report and order are offered at page 52, received over objection at page 56 and printed at pages 8 and 11.)

The plaintiff also offered in evidence the opinion of the Interstate Commerce Commission in the proceeding brought by Henry E. Meeker and Caroline H. Meeker against the Railroad, which opinion is dated June 8, 1911; and also offered the order of the Commission in the same proceeding, fixing the future rates, which order is also dated June 8, 1911 (R. 12). (Said opinion and order in said proceeding brought by Henry E. Meeker and Caroline H. Meeker were offered in evidence at page 48, received over objection at page 49 and printed at page 12.)

The plaintiff Meeker claimed at the trial and now claims that by placing in evidence four papers, viz.: (1) The report of the Commission dated May 7, 1912, in the proceeding brought by Mr. Meeker; (2) The reparation order dated May 7, 1912, in the same proceeding; (3) The report of the Commission of June 8, 1911, in the former proceeding, brought by Henry E. Meeker and

Caroline H. Meeker; and (4) The order as to the future rate in that case, dated June 8, 1912; he has proved his case and is entitled to judgment for the full amount. Taking this view of the case, the learned trial Judge instructed the jury that plaintiff in the absence of countervailing evidence to the contrary was entitled to the full amount claimed (R. 59).

### **Respondent's Points.**

The questions of law raised upon this writ will be discussed under the following heads:

FIRST: Plaintiff has failed to prove by competent evidence that the Railroad violated the Commerce Act. Plaintiff relied for his proof, upon the reports and orders of the Commission. These do not prove that unlawful rates were charged.

SECOND: Plaintiff has failed to prove by competent evidence that Mr. Meeker sustained damage. The measure of damages, if any, should be the loss to Mr. Meeker as the result of the alleged unreasonable rate. It does not follow from the conclusion of the Commission that an established rate is unreasonable in so far as it exceeds a stated amount, that a shipper who paid the established rate has been damaged, or that his damage, if any, should be measured by the difference between the two amounts.

THIRD: The Commission's opinion of June 8, 1911 in a former and separate proceeding was not admissible in an action for damage relating to entirely different causes of action. Said opinion contains statements, arguments and conclusions which the act does not purport to

make admissible as *prima facie* evidence in a suit for damage. In admitting the report in evidence the trial Court prejudiced the rights of the defendant, making it thereafter impossible for the defendant to place before the jury its side of the case unembarrassed by such incompetent and misleading statements.

FOURTH: Section 16 of the Commerce Act is unconstitutional in so far as it deprives the defendant in a damage suit of a fair trial by jury.

FIFTH: The allowances for counsel fees are invalid and excessive.

### **FIRST POINT.**

**Plaintiff has failed to prove by competent evidence that the Railroad violated the Commerce Act. Plaintiff relied for his proof upon the reports and orders of the Commission. These do not prove that unlawful rates were charged.**

At the trial defendant objected to the admission of the opinions of the Commission on this ground (R. 50 and 53). Defendant requested the Court to direct a verdict for the defendant upon this ground, which request was denied and exception duly taken (R. 61). The assignments of error in point are at page 69 of the record.

The Court charged the jury that the reports and orders of the Commission were *prima facie* evidence of the facts found in the reports and sufficient upon which to base a verdict in favor of the plaintiff for the amount claimed, in the absence of any countervailing evidence



to the contrary (R. 59). To this defendant duly excepted (R. 60).

It will be unnecessary to repeat in this brief the discussion of this point contained in the brief before this Court in the case of Henry E. Meeker, as surviving partner, etc., against this defendant, No. 434.

## SECOND POINT.

**Plaintiff has failed to prove by competent evidence that Mr. Meeker sustained damage. The measure of damages, if any, should be the loss to Mr. Meeker as the result of the alleged unreasonable rate. It does not follow from the conclusion of the Commission that an established rate is unreasonable in so far as it exceeds a stated amount, that a shipper who paid the established rate has been damaged, or that his damage, if any, should be measured by the difference between the two amounts.**

Defendant excepted to the charge of the Court to the effect that the reports were sufficient to sustain the verdict (R. 60). The defendant asked the Court to charge that there was no evidence that petitioner was in any way damaged, which request was denied and exception duly taken (R. 62). Error was duly assigned (R. 67, 69).

It will be unnecessary to repeat in this brief the discussion of this point contained in the brief before this Court in the case of Henry E. Meeker, as surviving partner, etc., against this defendant, No. 434.

### THIRD POINT.

**The Commission's opinion of June 8, 1911, in a former and separate proceeding was not admissible in an action for damage relating to entirely different causes of action. Said opinion contains statements, arguments and conclusions which the act does not purport to make admissible as prima facie evidence in a suit for damages. In admitting the report in evidence the Trial Court prejudiced the rights of the defendant, making it thereafter impossible for the defendant to place before the jury its side of the case unembarrassed by such incompetent and misleading statements.**

The defendant objected to the admission of the opinions on this ground. The objection was overruled and exception taken (R. 50, 53). Further objection to the admission of the report of June 8, 1911, was made on the ground that it was not the report in the proceeding specified in the petition in this action and that section 16 of the Act did not purport to make admissible reports in other proceedings, which objection was also overruled and exception taken (R. 48, 49). Error was duly assigned (R. 66).

Section 16 provides that in a reparation suit the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated. The findings and order referred to are the findings and order of the Commission, awarding the damages, to recover which the action is brought. Section 16 does not provide that the findings and order of the Commission in any proceeding ever had before it shall be *prima facie* evidence in this

action, nor does it provide that the findings and order of the Commission in any proceeding ever had before it between these same parties shall be *prima facie* evidence in this action.

In the opinion in the first proceeding before the Commission there is inserted the following statement: "In a later complaint, filed April 13, 1910, No. 3235, styled *Henry E. Meeker vs. Lehigh Valley Railroad Company*, complainant seeks reparation on the basis of a rate of \$1.00 on all grades of coal shipped during the period July 1, 1907, to April 1, 1910, alleging a total overcharge during said period of \$55,290.73. As the subject-matter of the two complaints is the same, in so far as the reasonableness of the rates is concerned, the disposition of the later case will perhaps be determined by the conclusions reached in this case" (R. 20).

The report of the Commission dated May 7th, 1912, constitutes the supplemental report in the first proceeding before the Commission and the only report made by the Commission in the second proceeding. That is to say, the only report made by the Commission in the second proceeding is contained in the last paragraph on page 9 and on page 10 of the record.

At the beginning of this report the Commission states: "With the exception of the reparation features, the issues involved in No. 3235 (the second proceeding) have been passed upon by the Commission in No. 1180. \* \* \* The petition in the present case, therefore, resolves itself into a prayer for reparation on shipments moving subsequent to the period covered by the original report, on the basis of the conclusions announced in that report" (R. 9, 10).

The Commission has not attempted to make the opinion in the first proceeding a part of the report in the second

proceeding. In fact, the Commission has stated that the second proceeding has resolved itself into a prayer for reparation (R. 10). It is doubtful if the Commission could, by referring to its report in a separate proceeding, make that report *prima facie* evidence in an action relating to a subsequent proceeding. It is not necessary to discuss that question because the Commission has not attempted to do so. The order of the Commission in the second proceeding makes the report of May 7th, 1912, a part of the order. It neither refers to nor makes a part of itself, the opinion of June 8th, 1911. We can find no evidence of an intention on the part of the Commission to so word its report and order in the second proceeding that the opinion in the first proceeding could be used as *prima facie* evidence in this action.

It will be unnecessary to repeat in this brief the discussion of this point contained in the brief before this Court in the case of Henry E. Meeker, as surviving partner, etc., against this defendant, No. 434.

#### FOURTH POINT.

**Section 16 of the Commerce Act is unconstitutional in so far as it deprives the defendant in a damage suit of a fair trial by jury.**

Defendant objected on this ground to the receipt in evidence of the opinions and orders of the Commission, which objection was overruled and exception taken (R. 50, 52 and 54). Defendant requested the trial Court to direct a verdict for the defendant upon this ground. This request was denied and exception taken (R. 60). The Court charged that the reports and

orders of the Commission were *prima facie* evidence of the facts found in the report and sufficient upon which to base a verdict in favor of the plaintiff for the amount claimed in the absence of countervailing evidence to the contrary, to which defendant duly excepted (R. 59, 60). The assignments of error in point are at pages 66 and 68 of the record.

It will be unnecessary to repeat in this brief the discussion of this point contained in the brief before this Court in the case of Henry E. Meeker, as surviving partner, etc., against this defendant, No. 434.

### **FIFTH POINT.**

**The allowances for counsel fees are invalid and excessive.**

Exception was taken to the granting of these fees (R. 63). The allowance of these fees is assigned as error (R. 70).

Without repeating the argument of this point contained in the last point of the brief in action No. 434, we call attention to the fact that the allowance of \$2,500 for services in the proceeding before the Commission is entirely unwarranted and entirely without authority of the statute. Such allowance before the Commission is grossly excessive, inasmuch as the report states that the hearing before the Commission consisted merely in putting in a schedule of shipments, the correctness of which the defendant admitted (R. 9 and 10). An allowance of \$2,500 for services in this suit is also grossly excessive. If Section 16 of the Act is valid it has certainly furnished the plaintiff with a simple remedy. His counsel

has taken advantage of it in all its simplicity. The Act limits the award to "a reasonable attorney's fee." This case has followed the earlier case, as the tail follows a kite. The services have been but nominal. The amount recovered is \$13,161. The counsel fees allowed aggregate \$5,000, or forty per cent of the verdict.

EDGAR H. BOLES,  
Solicitor for Respondent.

JOHN G. JOHNSON,  
FRANK H. PLATT,  
GEORGE W. FIELD,  
Counsel.

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**MEEKER, SURVIVING PARTNER OF MEEKER  
& COMPANY, *v.* LEHIGH VALLEY RAILROAD  
COMPANY.**

**CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE  
THIRD CIRCUIT.**

No. 434. Argued October 13, 14, 1914.—Decided February 23, 1915.

The limitations in Rev. Stat., § 1047, on suits for penalties accruing under the laws of the United States, relate to punitive penalties for infractions of public law and not to liabilities imposed for redressing a private injury even though the wrongful act be a public offense and punishable as such. It does not relate to a liability ac-



cruing under §§ 8, 9, 14 and 16 of the Act to Regulate Commerce which is not punitive but strictly remedial.

While Congress did not intend, in amending § 16 of the Act to Regulate Commerce by the act of July 29, 1906, to reserve claims already barred by local statutes, it did intend to take all other claims out of the operation of the varying state laws and subject them to limitations of its own creation operating alike in all the States.

The effect of the amendment to § 16 of the Act to Regulate Commerce by the act of July 29, 1906, was to extend the time for invoking action by the Commission upon complaints for damages to two years from the accrual of the claim, but until one year after the passage of the act as to all claims which had accrued before its passage.

The purpose of the joint resolution of June 30, 1906, postponing the effective date of the act of June 29, 1906, amending the Act to Regulate Commerce, was to cause the act to speak and operate at the end of the postponed period as if that were the time of its passage, and when the extended period expired it gave a full year for presenting accrued claims.

Objections to portions of the reports of the Interstate Commerce Commission awarding reparation for which the action is brought, on the ground that they contain statements which are not findings of fact, and not definitely identified in the record, are waived by failure to direct the court to the subject when charging the jury.

Under § 16 of the Act to Regulate Commerce, as amended by the act of June 29, 1906, the report of the Commission awarding reparation need not necessarily state the evidential facts, but must contain findings of the ultimate facts, and as so stated they are to be taken as *prima facie* true.

In this case *held* that the facts stated, although interwoven with other matter, and not expressed in terms generally employed by courts in special findings of fact, if taken as *prima facie* true, sustain an award against the carrier made by the Commission to shippers, as damages for unjust discrimination resulting from giving rebates to other shippers.

Where there are two reports of the Interstate Commerce Commission in the same proceeding and the later affirmatively shows that it was supplemental to the original report, they should be read together.

The measure of damages to a shipper is the pecuniary loss inflicted upon him as the result of giving rebates to other shippers and requiring him to pay the higher rate. Such loss must be proved in order to be recovered. Where the findings show that the amount awarded was the actual loss and recite that they are based on evi-

dence, it must be presumed, in the absence of the contrary being shown, that they are justified by the evidence.

A statute making findings and reparation order of a body, such as the Interstate Commerce Commission, *prima facie* evidence of facts therein stated, but only establishing, as in the case of § 16 of the Act to Regulate Commerce, a rebuttable presumption, cutting off no defense, and taking no question of fact from the court or the jury, is merely a rule of evidence and is not unconstitutional as abridging the right of trial by jury or denying due process of law.

*Quære*, whether the mere amount of an allowance for counsel fees under § 16 of the Act to Regulate Commerce, made by the court below, can be reëxamined in this court; but *held* that where the record shows that it was predicated upon a transcript of proceedings, and on statements in open court, and no evidence appears to have been offered or objections made by defendant as to amount, defendant cannot claim in this court that the allowance is excessive.

Although this court may not review the amount of such an allowance, it may determine whether as matter of law it is objectionable altogether.

Under §§ 8 and 16, of the Act to Regulate Commerce, the allowance for attorney's fee to be added as costs to the judgment recovered by a shipper on an unpaid award for reparation is for services of the attorney in the action on the award and not for services in the proceeding before the Commission, and such part of an allowance for attorney's fees as is specially given for services in that proceeding should be eliminated from the judgment.

211 Fed. Rep. 785, reversed.

THE facts, which involve the construction of §§ 1 and 2 of the Act to Regulate Commerce and questions of discrimination by the carrier against shippers of coal over its line, are stated in the opinion.

*Mr. John A. Garver and Mr. William A. Glasgow, Jr.*, for petitioner.

*Mr. John G. Johnson*, with whom *Mr. Edgar H. Boles*, *Mr. Frank H. Platt* and *Mr. George W. Field* were on the brief, for respondent:

Plaintiff has failed to prove by competent evidence that

The railroad violated the Commerce Act. Plaintiff relied on his proof, upon the reports and orders of the Commission. These do not prove that Meeker and Company were discriminated against; and do not prove that unlawful rates were charged.

Plaintiff has failed to prove by competent evidence that petitioner sustained damage. The measure of damages, if any, should be the loss to petitioner as the result of the alleged discrimination or the alleged unreasonable rate. It does not follow from the conclusion of the Commission that an established rate is unreasonable in so far as it exceeds a stated amount, that a shipper who paid the established rate has been damaged, or that his damage, if any, should be measured by the difference between the two amounts.

The Commission's opinions contain statements, arguments and conclusions which the act does not purport to make admissible as *prima facie* evidence in a suit for damages. In admitting the reports in evidence the trial court prejudiced the rights of defendant, making it hereafter impossible for the defendant to place before the jury its side of the case unembarrassed by the incompetent and misleading statements in the opinions.

Section 16 of the Act to Regulate Commerce is unconstitutional in so far as it deprives the defendant in a damage suit of a fair trial by jury.

The complaint in the proceeding before the Commission was filed July 17, 1907, at a time when the right of the Commission to pass upon the discrimination claims and the greater part of the excessive charge claims had expired by limitation.

The Commission had no jurisdiction over any claims accrued prior to July 17, 1905.

On July 17, 1907, when the complaint was filed before the Commission all claims accruing prior to July 17, 1902, had been outlawed by § 1047, Rev. Stat.

On September 3, 1912, when an action was commenced the plaintiff was barred by limitation from bringing an action upon any of his claims.

The allowances for counsel fees are invalid and excessive.

In support of these contentions, see *Atchison, T. & S. F. v. Int. Com. Comm.*, 188 Fed. Rep. 229; *Atchison, T. & S. F. v. Matthews*, 174 U. S. 96; *Baer Bros. v. Denver & R. G. R. R.*, 200 Fed. Rep. 614, 233 U. S. 479; *Balt. & Oh. R. R. v. Pitcairn Coal Co.*, 215 U. S. 481; *Blake v. National Banks*, 23 Wall. 307; *Carter v. N. O. & N. E. R. R.*, 143 Fed. Rep. 90; *Cattle Raisers' Assn. v. Ft. Worth & D. C. Ry.*, 7 I. C. C. 513; *Holy Trinity Church v. United States*, 143 U. S. 457; *Chicago, B. & Q. R. R. v. Feintuch*, 191 Fed. Rep. 482; *Cin., & Tex. Pac. Ry. v. Int. Com. Comm.*, 162 U. S. 184; *Coggell v. Lawrence*, 6 Fed. Cases, 2957; *Councill v. R. R.*, 1 I. C. C. 339; *Darnell Lumber Co. v. Sou. Pac. Co.*, 190 Fed. Rep. 659; *Dickerson v. Louis. & Nash. R. R.*, 15 I. C. C. 170, 191 Fed. Rep. 705; *Equitable Life Ass'n v. Hughes*, 125 N. Y. 106; *Farmers' Warehouse Co. v. Louis. & Nash. R. R.*, 12 I. C. C. 457; *Goff-Kirby Coal Co. v. Railroad*, 13 I. C. C. 383; *Gulf, Col. & S. F. Ry. v. Ellis*, 165 U. S. 150; *Heck v. Railroad*, 1 I. C. C. 495; *Int. Com. Comm. v. C. P. & V. R. R.*, 124 Fed. Rep. 624; *Int. Com. Comm. v. Louis. & Nash. R. R.*, 73 Fed. Rep. 409, 227 U. S. 88; *Int. Com. Comm. v. Un. Pac. R. R.*, 222 U. S. 541; *Jacoby v. Penna. R. R.*, 200 Fed. Rep. 989; *Kile & Morgan v. Railway Co.*, 15 I. C. C. 235; *Ky. & Ind. Bridge Co. v. Louis. & Nash. R. R.*, 37 Fed. Rep. 567; *Lehigh Valley R. R. v. Clark*, 207 Fed. Rep. 717; *Macloon v. Railroad*, 5 I. C. C. 84; *Maryland v. Balt. & Ohio R. R.*, 3 How. 534; *McClaine v. Rankin*, 179 U. S. 158; *Mitchell Coal Co. v. Penna. R. R.*, 230 U. S. 247; *Morrisdale Coal Co. v. Penna. R. R.*, 183 Fed. Rep. 929; *S. C.*, 230 U. S. 304; *Mo. & Kan. Shippers' Assn. v. R. R.*, 13 I. C. C. 411; *Nicola v. Louis. & Nash. R. R.*, 14 I. C. C. 199; *Norris v. Crocker*, 13 How. 429; *Parsons v. Bedford*, 3 Peters, 433; *Parsons*

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*Chic. & N. W. Ry.*, 167 U. S. 447; *Penn. R. R. v. International Coal Co.*, 230 U. S. 184; *Rawson v. R. R.*, 3 C. C. 266; *Riddle v. Railroad*, 1 I. C. C. 594; *Robinson v. Balt. & Ohio R. R.*, 222 U. S. 506; *Russe v. Int. Com. Comm.*, 193 Fed. Rep. 678; *Seaboard Air Line v. Seegers*, 197 U. S. 73; *Southern Ry. v. St. Louis Hay Co.*, 153 Fed. Rep. 728; *Tex. & Pac. Ry. v. Abilene Cotton Co.*, 204 U. S. 26; *United States v. Del. & Hud. Co.*, 213 U. S. 366; *United States v. Standard Oil Co.*, 148 Fed. Rep. 719; *Walker v. Sou. Pac. Co.*, 165 U. S. 593; *Western N. Y. P. Ry. v. Penn. Refining Co.*, 137 Fed. Rep. 343; *Woodward v. R. R.*, 17 I. C. C. 9; 1 Bouvier's Law Dict., 370; Drinker on Interstate Commerce; Judson on Interstate Commerce; 2 Stewart's Purdon's Digest, 13th ed., 2282; Rev. Stat., § 1047.

By leave of court, *Mr. Joseph W. Folk* and *Mr. Charles Needham* filed a brief in behalf of the Interstate Commerce Commission.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This was an action under § 16 of the Act to Regulate Commerce<sup>1</sup> to recover from the Lehigh Valley Railroad company damages alleged to have been sustained by a shipper and awarded by the Interstate Commerce Commission by reason of the company's violation of the provision in §§ 1 and 2 of that act against unreasonable rates and unjust discrimination. The plaintiff prevailed in the District Court, but the Circuit Court of Appeals reversed the judgment, 211 Fed. Rep. 785, and a writ of

<sup>1</sup> See act February 4, 1887, c. 104, 24 Stat. 379, and amendments of March 2, 1889, c. 382, 25 Stat. 855; February 10, 1891, c. 128, 26 Stat. 103; February 8, 1895, c. 61, 28 Stat. 643; June 29, 1906, c. 3591, 34 Stat. 584; and June 30, 1906, 34 Stat. 838, Joint Resolution No. 47.

certiorari granted under § 262 of the Judicial Code brings the case here. 234 U. S. 749.

The plaintiff was the surviving member of Meeker & Company, a copartnership, and sued in that capacity. This firm was engaged in the anthracite coal trade in New York City and was accustomed to purchase its coal at collieries in Pennsylvania and to ship it over the defendant's railroad to tidewater at Perth Amboy, New Jersey, and thence by vessel to New York. Two distinct claims were involved. The first covered shipments from November 1, 1900, to August 1, 1901, and was grounded upon a charge that the railroad company had unjustly and injuriously discriminated against Meeker & Company by giving (on August 1, 1901) to another and extensive shipper of anthracite between the same points an indirect but substantial rebate upon all shipments during the same period, and that by reason of this rebate the other shipper had obtained a contemporaneous service in all respects like that rendered for Meeker & Company at a less rate than was exacted from the latter. The second covered shipments from August 1, 1901, to July 17, 1907, and was based upon the charge that the established rate paid by Meeker & Company during that period was excessive and unreasonable.

On July 17, 1907, a complaint embodying both claims was presented to the Interstate Commerce Commission under §§ 9 and 13 of the act, and after a full hearing in which the railroad company was an active participant, the Commission made a written report (21 I. C. C. 129) finding that the charge of unjust discrimination was sustained by the evidence, condemning as excessive and unreasonable the rate which was in effect from August 1, 1901, to the date of the report, naming what was deemed a maximum reasonable rate, holding that the claimant was entitled to an award of reparation upon both claims, and directing that further proceedings be had to determine the

amount to be awarded. Under § 15 of the act an order was then made requiring the railroad company within a time named to cease giving effect to the prior rate found unreasonable and to establish a new rate not exceeding that found reasonable.

Thereafter a further hearing was had at which additional evidence bearing upon the question of reparation was presented, and, on May 7, 1912, the Commission made a supplemental report, saying (23 I. C. C. 480):

"In our original report we found that the rates charged complainant for the transportation of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., during the period from November 1, 1900, to August 1, 1901, were unjustly discriminatory in violation of § 2 of the act to the extent that they exceeded the rates contemporaneously charged the Lehigh Valley Coal Company under the contract then in effect between that company and defendant; and we further found that the rates in effect from August 1, 1901, to July 17, 1907, were unreasonable to the extent that they exceeded rates of \$1.40 per gross ton on prepared sizes, \$1.30 on pea, and \$1.15 on buckwheat.

"On basis of our conclusions in the former report, and upon consideration of the evidence adduced at the hearing upon the question of reparation, we now find that during the period from November 1, 1900, to August 1, 1901, complainant shipped from the Wyoming coal region of Pennsylvania to Perth Amboy, N. J., 55,257.75 tons of coal of prepared sizes, 16,689.76 tons of pea coal, 11,448.93 tons of buckwheat coal, and 4,926.77 tons of rice coal, and paid charges thereon, amounting to \$129,989.18, at the rates found to have been unjustly discriminatory; that complainant has been damaged to the extent of the difference between the amount which he did pay and \$118,979.85, the amount which he would have paid had he been given the benefit of the rates applied by defendant to similar ship-



ments of the Lehigh Valley Coal Company; and that he is, therefore, entitled to an award of reparation in the sum of \$11,009.33, with interest thereon from August 1, 1901. We find further that from August 1, 1901, to July 17, 1907, complainant shipped from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., 246,870.15 tons of coal of prepared sizes, 106,051.09 tons of pea coal, and 87,250 tons of buckwheat coal, and paid charges thereon amounting to \$685,375.27, at the rates found to have been unreasonable; that complainant has been damaged to the extent of the difference between the amount which he did pay and \$626,945.62, the amount which he would have paid at the rates found reasonable, less \$193.20 deducted by stipulation of all parties on account of certain claims already paid; and that he is, therefore, entitled to an additional award of reparation in the sum of \$58,236.45, with interest, amounting to \$27,750.64, on the individual charges comprising said sum from the dates of payment thereof to September 1, 1911, together with interest on said sum of \$58,236.45 from September 1, 1911.

\* \* \* \* \*

"The exhibits showing details respecting the shipments upon which reparation is asked are too extensive to be set forth in this report. But inasmuch as the accuracy of the figures in said exhibits respecting the shipments made, freight charges paid, and reparation due, is conceded of record by defendant, we deem it unnecessary to make detailed findings respecting the numerous shipments involved."

Thereupon the Commission made and entered of record an order for reparation which, with a slight amendment made June 15, 1912, was as follows:

"This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and

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ings involved having been had, and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made part hereof:

"It is Ordered, That defendant Lehigh Valley Railroad Company be and it is hereby authorized and required to pay unto complainant, Henry E. Meeker, surviving partner of Henry E. Meeker and Caroline H. Meeker, co-partners, trading as Meeker & Company, on or before the 1st day of August, 1912, the sum of \$11,009.33, with interest thereon, at the rate of 6 per cent. per annum, from the 1st day of August, 1901, as reparation for unjustly discriminatory rates charged for the transportation of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., which rates so charged have been found by this Commission to have been unjustly discriminatory, as more fully and at large appears and by said report of the Commission.

"It is Further Ordered, That defendant Lehigh Valley Railroad Company be and it is hereby authorized and required to pay unto complainant, Henry E. Meeker, surviving partner of Henry E. Meeker and Caroline H. Meeker, co-partners, trading as Meeker & Company, on or before the 1st day of August, 1912, the sum of \$8,236.45, with interest thereon at the rate of 6 per cent. per annum, amounting to \$27,750.64, upon the various individual charges comprising said sum, from the dates of payment thereof to September 1, 1911, as itemized in complainant's Exhibit 2, together with interest at the rate of 6 per cent. per annum on said sum of \$8,236.45, from September 1, 1911, as reparation for unreasonable rates charged for the transportation of various shipments of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., which rates so charged have been found by this Commis-

sion to have been unreasonable, as more fully and at large appears in and by said report of the Commission."

Although duly served with a copy of this order, the railroad company refused to comply with it; and, on September 3, 1912, after the time allotted for compliance had expired, the plaintiff, conformably to § 16 of the act, filed in the District Court his petition setting forth briefly the causes for which he claimed damages and the reports and orders of the Commission, and praying judgment against the railroad company for the amounts claimed and awarded and for interest and costs, including a reasonable attorney's fee. The defendant answered denying the claims set forth in the petition and asserting that they were barred by the applicable statute of limitations, that the Commission was without jurisdiction "to make the findings and order of reparation" relied upon, and that "there was before the Commission no substantial evidence to sustain said findings and said order." A trial resulted in a verdict for the plaintiff assessing the damages at \$109,280.17, the total amount awarded by the Commission with interest, and judgment was entered for this sum with costs, including an attorney's fee.

At the trial the plaintiff produced no evidence tending to show unjust discrimination, exaction of unreasonable rates, injury to Meeker & Company or what damages were sustained by them, other than the evidence afforded by the reports and orders of the Commission; and the defendant produced no evidence whatever, save some computations intended to be helpful in determining how much of the claims was barred according to each of several views advanced respecting the applicable statute of limitations.

Whether the claims were barred in whole or in part by some applicable statute is one of the questions which the record presents, and to dispose of it we must notice three statutes upon which the defendant relies.

One of these is Rev. Stat., § 1047, which places a limitation of five years upon any "suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States." The words "penalty or forfeiture" in this section refer to something imposed in a punitive way for an infraction of a public law, and do not include a liability imposed for the purpose of redressing a private injury, even though the wrongful act be a public offense and punishable as such. Here the liability sought to be enforced was not punitive but strictly remedial, as is shown by §§ 8, 9, 14 and 16 of the Act to Regulate Commerce. So § 1047 was not applicable. *Chattanooga Foundry v. Atlanta*, 203 U. S. 390, 397; *O'Sullivan v. Felix*, 233 U. S. 318; *Huntington v. Attrill*, 146 U. S. 657, 666-669; *Brady v. Daly*, 175 U. S. 148.

Next in order is a Pennsylvania statute containing a limitation of six years. 2 Stewart's Purdon's Digest, 13th ed. 2282. It could apply only in the absence of a controlling Federal statute. Rev. Stat., § 721; *Campbell v. Haverhill*, 155 U. S. 610; *McClaine v. Rankin*, 197 U. S. 154, 158; *O'Sullivan v. Felix*, *supra*. Such a statute was adopted and put in force before any part of either claim fell within the bar of the local limitation. By the act of June 29, 1906, c. 3591, 34 Stat. 584, 590, Congress amended § 16 of the Act to Regulate Commerce by incorporating therein the following limitations: "All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the Circuit Court <sup>1</sup> within one year from the date of the order, and not after: Provided, that claims accrued prior to the passage of this Act may be presented

<sup>1</sup>The Judicial Code, § 291, which became effective January 1, 1912, requires that the words "Circuit Court" be read "District Court."

within one year." The words of the proviso make it certain that the amendment was to reach claims already accrued as well as those thereafter accruing. And while there doubtless was no purpose to revive claims then barred by local statutes, it is evident that Congress intended to take all other claims out of the operation of the varying laws of the several States and subject them to limitations of its own creation which would operate alike in all the States.

This amendment is the third statute upon which the defendant relies, the contentions advanced thereunder being (a) that it prevented the Commission from considering any claim accrued more than two years prior to the amendment, and (b) that the year granted for filing claims which accrued before the amendment expired June 28, 1907. Either contention, if sound, would defeat all of the first claim in suit and the major part of the second.

The first contention is plainly not tenable. The amendment contained a general provision limiting the time for invoking action by the Commission upon complaints for damages to two years from the accrual of the claim, and also a proviso saying that "claims accrued prior to the passage of this Act may be presented within one year." The proviso was in the nature of a saving clause, and, while, as before observed, it probably was not intended to revive claims which were then barred by applicable local laws, we think there is no warrant for saying that it was not intended to include claims accrued more than two years before the amendment. The plain import of the words is to the contrary. The Commission has uniformly construed it as permitting all accrued claims, not already barred, to be presented within the year named, and we think they reasonably could not have done otherwise.

The other contention turns upon the sense in which the words "the passage of this Act" were used in the proviso. The act contained a concluding section saying

"this Act shall take effect and be in force from and after its passage," but, on the day following its approval, its effective date was postponed by a joint resolution for sixty days, that is, from June 29 to August 28, 1906. 34 Stat. 838. If the act be separately considered and the proviso read in connection with the concluding section, we think it is apparent that the words named referred to the time when the act was to speak and operate as a law, and that the year given for filing accrued claims was to be reckoned from that time. In other words, the meaning was the same as if the proviso had said "claims accrued heretofore may be presented within one year hereafter," or "claims accrued before this Act becomes effective may be presented within one year thereafter." It was not an instance where words referring to the date of passage were chosen to distinguish it from the effective date of the act, for the act was to take effect and be in force upon its passage, and therefore there was no occasion for such a distinction. And, coming to the joint resolution, we think it did not affect the sense of the words in the proviso. That was to be determined in the light of the situation in which they were used, and not by what subsequently happened. Not only so, but the purpose of the joint resolution was to cause the act to speak and operate at the end of the sixty days as if that were the time of its passage. In the meantime the act laid no duty upon this or any other claimant and when the sixty days expired it gave a full year for presenting accrued claims, and not a year less sixty days. See *Matter of Howe*, 112 N. Y. 100; *Harding v. People*, 10 Colorado, 387, 392; *State v. Bemis*, 45 Nebraska, 724, 739; *Patrick v. Perryman*, 52 Ill. App. 514, 518; *Schneider v. Hussey*, 2 Idaho, 8; *Charless v. Lamberson*, 1 Iowa, 435, 443. It is not a question of notice, as in *Diamond Glue Co. v. United States Glue Co.*, 187 U. S. 611, 615-616, but of the meaning and operation of the statute.

It follows from these views that the complaint, which was filed with the Commission July 17, 1907, was seasonably presented and that no part of either claim was barred at that time. And, as the action in the District Court was begun within a year after the date of the order for reparation, the defense predicated upon the statute of limitations must fail.

With a single exception, the other questions pressed upon our attention center about the use and effect of the reports and orders of the Commission as evidence, a subject concerning which the courts below differed.

The pertinent provisions of the Act to Regulate Commerce are these: Section 14 (34 Stat. 589) requires the Commission, upon investigating a complaint, to make a written report thereon "which shall state the conclusions of the Commission, together with its decision, order or requirement in the premises," and, if damages be awarded, "shall include the findings of fact on which the award is made." Section 16 (34 Stat. 590) requires the Commission, upon awarding damages to a complaining party, to make an order directing that "the sum to which he is entitled " be paid within a fixed time; and then, after authorizing a suit to enforce payment, if the order be not obeyed, provides: "Such suit shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated."

At the trial the plaintiff offered in evidence the reports and orders of the Commission and asked that the facts stated in the findings and orders be taken as *prima facie* true.

An objection was interposed to the admission of the reports upon the ground that they contained various statements which it was claimed were not findings of fact and therefore were not admissible. A colloquy ensued



between court and counsel in which counsel for the plaintiff conceded that portions of the reports should be eliminated and suggested that this could be done in the charge to the jury. As a result of the colloquy the reports were received in evidence, the court observing that it would indicate to the jury what portions were to be considered. The reports were not read at the time, but when the evidence was concluded counsel for the plaintiff, as the record recites, "read to the jury what he stated to be material portions" of them. The record does not more definitely identify what was read; nor does it show that complaint was then made that anything was read that should have been omitted, or that the court's attention was drawn to the subject at the time of charging the jury either by a request for a particular instruction thereon or by excepting to the absence of such an instruction. The court's charge apparently proceeded upon the theory that the portions of the reports which had been read to the jury were properly before them. In these circumstances the objection cannot now be considered. If it was not obviated by excluding the supposedly objectionable portions of the reports from what was read to the jury, it was waived by the failure to direct the court's attention to the subject when the jury was charged. •

Another objection which was directed against the orders as well as the reports is that they contain no findings of fact or at least not enough to sustain an award of damages. The arguments advanced to sustain this objection proceed upon the theory that the statute requires that the reports, if not the orders, shall state the evidential rather than the ultimate facts, that is to say, the primary facts from which through a process of reasoning and inference the ultimate facts may be determined. We think this is not the right view of the statute and that what it requires is a finding of the ultimate facts—a finding which, as applied to the present case, would disclose (1) the relation of the parties

as shipper and carrier in interstate commerce; (2) the character and amount of the traffic out of which the claim arose; (3) the rates paid by the shipper for the service rendered and whether they were according to the established tariff; (4) whether and in what way unjust discrimination was practiced against the shipper from November 1, 1900, to August 1, 1901; (5) whether, if there was unjust discrimination, the shipper was injured thereby, and, if so, the amount of his damages; (6) whether the rate collected from the shipper from August 1, 1901, to July 17, 1907, was excessive and unreasonable and, if so, what would have been a reasonable rate for the service, and (7) whether, if the rate was excessive and unreasonable, the shipper was injured thereby, and, if so, the amount of his damages. Upon examining the reports as set forth in the record, we think they contain findings of fact which meet the requirements of the statute and that the facts stated in the findings, if taken as *prima facie* true, sustain the award of the Commission. True, the findings in the original report are interwoven with other matter and are not expressed in the terms which courts generally employ in special findings of fact, but there is no difficulty in separating the findings from the other matter or in fully understanding them, and particularly is this true when the two reports are read together, as they should be. We say "should be" because both were made in the same proceeding and the later one affirmatively shows that it was made to supplement and give effect to the original.

But it is said that the reports disclose that the Commission applied an erroneous and inadmissible measure of damages, and therefore that no effect can be given to the award. What the reports really disclose is that the Commission "upon consideration of the evidence adduced upon the hearing upon the question of reparation" found (a) that by reason of the unjust discrimination resulting from

giving the rebate to the Lehigh Valley Coal Company Meeker & Company were "damaged to the extent of the difference" between what they actually paid from November 1, 1900, to August 1, 1901, and what they would have paid had they been dealt with on the same basis as was the Coal Company, and (b) that by reason of being charged an excessive and unreasonable rate from August 1, 1901, to July 17, 1907, Meeker & Company were "damaged to the extent of the difference" between what they actually paid and what they would have paid had they been given the rate which the Commission found would have been reasonable. In this we perceive nothing pointing to the application of an erroneous or inadmissible measure of damages. The Commission was authorized and required by § 8 of the Act to Regulate Commerce to award "the full amount of damages sustained," and that, of course, was to be determined from the evidence. If it showed that the damages corresponded to the rebate in one instance and to the overcharge in the other the claimant was entitled to an award upon that basis. The case of *Pennsylvania Railroad v. International Coal Mining Co.*, 230 U. S. 184, is cited as holding otherwise, but it does not do so. There a shipper, without proving that he sustained any damages, sought to recover from a carrier for giving a rebate to another shipper, and this court, referring to § 8, said (p. 203): "The measure of damages was the pecuniary loss inflicted on the plaintiff as the result of the rebate paid. Those damages might be the same as the rebate, or less than the rebate, or many times greater than the rebate; but unless they were proved they could not be recovered. Whatever they were they could be recovered." There is nothing in either report of the Commission which is in conflict with what was said in that case. On the contrary, the plain import of the findings is that the amounts awarded represent the claimant's actual pecuniary loss; and, in view of the recital that the

findings were based upon the evidence adduced, it must be presumed, there being no showing to the contrary, that they were justified by it.

It is also urged, as it was in the courts below, that the provision in § 16 that, in actions like this, "the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated" is repugnant to the Constitution in that it infringes upon the right of trial by jury and operates as a denial of due process of law.

This provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to full contestation of all the issues, and takes no question of fact from either court or jury. At most therefore it is merely a rule of evidence. It does not abridge the right of trial by jury or take away any of its incidents. Nor does it in any wise work a denial of due process of law. In principle it is not unlike the statutes in many of the States whereby tax deeds are made *prima facie* evidence of the regularity of all the proceedings upon which the validity depends. Such statutes have been generally sustained, *Pillow v. Roberts*, 13 How. 472, 476; *Marx v. Hanthorn*, 148 U. S. 172, 182; *Turpin v. Lemon*, 187 U. S. 51, 59; *Cooley's Constitutional Limitations*, 7th ed. 52. As have many other state and Federal enactments establishing other rebuttable presumptions. *Mobile & C. Railroad v. Turnipseed*, 219 U. S. 35, 42; *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 81; *Reitler v. Harris*, 221 U. S. 437; *Luria v. United States*, 231 U. S. 9, 25. An instructive case upon the subject is *Holmes v. Hunt*, 122 Massachusetts, 505, where, in an elaborate opinion by Chief Justice Gray, a statute making the report of a public auditor *prima facie* evidence at the trial before a jury was held to be a legitimate exercise of legislative power over the rules of evidence and in no wise inconsistent with the constitutional right of trial by jury. And in *Chicago & North Western Railroad v. Jones*, 149 Illinois, 361, 382, a like ruling was

made in respect of a statutory provision similar to that now before us.

Complaint is made because the court refused to direct a verdict for the defendant, but of this it suffices to say that the ruling was undoubtedly right, because the plaintiff's evidence, including the findings and orders of the Commission, tended to show every fact essential to a recovery upon both claims and there was no opposing evidence.

The District Court made an allowance of \$20,000 as a fee for the plaintiff's attorneys and directed that it be taxed and collected as part of the costs, the allowance being expressly apportioned in equal amounts between the services in the proceeding before the Commission and the services in the action in court. Complaint is made of this on the grounds (a) that the allowance is in any view excessive, (b) that the act does not authorize an allowance for services before the Commission, and (c) that the provision authorizing an allowance for services in the action is invalid as being purely arbitrary and as imposing a penalty merely for failing to pay a debt.

Without considering whether the mere amount of an allowance under the statute can ever be reexamined here (see Rev. Stat., § 1011; *Martinton v. Fairbanks*, 112 U. S. 670, 672; *Montague v. Lowry*, 193 U. S. 38, 48; *Railroad Co. v. Fraloff*, 100 U. S. 24, 31; *New York &c. Railroad v. Winter*, 143 U. S. 60, 75) we are clear that it cannot be in this instance. The record discloses that the allowance was predicated upon an exhibition of a transcript of the proceedings before the Commission and upon a statement made in open court, in the presence of counsel for the defendant, of the services rendered before the Commission and in the action. But the transcript and statement have not been made part of this record and so we cannot know what was shown by them and cannot judge of their bearing upon the amount of the allowance. Besides, it does not appear that the defendant offered any evidence tend-

ing to show what would be a reasonable allowance that it in any way objected or excepted to the amount of the allowance when it was made. The only exception reserved was addressed to the allowance of any fee for the services before the Commission or for those in action. In this situation the defendant is not now in position to claim that as matter of fact the allowance was excessive. Whether as matter of law it is objectionable is another question.

Section 8 provides that a carrier violating the act shall be liable to any person injured for the damages he sustains, "together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case." And § 16, relating to action to enforce claims for damages after the Commission has acted thereon, provides "If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit."

In our opinion the services for which an attorney's fee is to be taxed and collected are those incident to the action in which the recovery is had and not those before the Commission. This is not only implied in the words of the two provisions just quoted but is suggested by the absence of any reference to proceedings anterior to the action. And that nothing more is intended becomes plain when we consider another provision in § 16 which requires the Commission, upon awarding damages, to make an order directing the carrier to pay the sum awarded "on or before a day named" and then declares that, if the carrier does not comply with the order "within the time limited the claimant may proceed to collect the damages by suit." The Commission is not to allow a fee, but only to fix the amount of the damages and fix a time for payment; and, if the carrier pays the award within the time named, no right to an attorney's fee arises. It is only when

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damages are recovered by suit that a fee is to be allowed, and this is as true of the provision in § 8 as of that in § 16. The evident purpose is to charge the carrier with the cost and expenses entailed by a failure to pay without suit—if the claimant finally prevails—and to that end to tax as part of the costs in the suit wherein the recovery is had a reasonable fee for the services of the claimant's attorney in instituting and prosecuting that suit. It follows that the District Court erred in matter of law in allowing a fee for services before the Commission.

The contention that the provision for an attorney's fee for services in the suit is invalid as being purely arbitrary and as imposing a penalty for merely failing to pay a debt is without merit. The provision is leveled against common carriers engaged in interstate commerce, a *quasi* public business, and is confined to cases wherein a recovery is had for damages resulting from the carrier's violation of some duty imposed in the public interest by the Act to Regulate Commerce. *Atlantic Coast Line Railroad v. Riverside Mills*, 219 U. S. 186, 208. One of its purposes is to promote a closer observance by carriers of the duties so imposed; and that there is also a purpose to encourage the payment, without suit, of just demands does not militate against its validity. *Missouri, Kansas & Texas Railway v. Cade*, 233 U. S. 642, 651, and cases cited. It requires that the fee be reasonable and fixed by the court, and does not permit it to be taxed against the carrier until the plaintiff's demand has been adjudged upon full inquiry to be valid. In these circumstances the validity of the provision is not doubtful but certain.

It results from what has been said that the judgment of the Circuit Court of Appeals must be reversed and that of the District Court must be modified by eliminating the allowance of \$10,000 as an attorney's fee for services before the Commission and affirmed as so modified.

*It is so ordered.*



MEEKER *v.* LEHIGH VALLEY RAILROAD.CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE  
THIRD CIRCUIT.

No. 435. Argued October 13, 14, 1914.—Decided February 23, 1915.

*Meeker & Co. v. Lehigh Valley R. R.*, *ante*, p. 412, followed as to construction effect of the amendment to § 16 of the Act to Regulate Commerce and the act of June 29, 1906, in regard to presentation of claims by shippers against carriers for damages by reason of unreasonable and excessive rates and discrimination, and that the attorney's fee allowed for recovery of the amount awarded can only be for proceeding in court and not on proceedings before the Commission.

A report of the Interstate Commerce Commission holding a rate excessive and declaring what would be a reasonable rate and a reparation order based thereon were properly admitted as *prima facie* evidence of the facts therein contained, although made in another and identical proceeding between the same parties, and which the Commission had power in its discretion to consolidate therewith, it also appearing that the carrier did not then object to its admission and the order recited that it was made after a full hearing on, and submission of, the issues in the proceeding in which it was made. Harmless error constitutes no ground for reversal, and so *held* as to the presence of irrelevant matter in a report of the Interstate Commerce Commission which matter, while it should not have gone to the jury, did not prejudice respondent.

211 Fed. Rep. 785, reversed.

THE facts, which involve the construction of §§ 1, 2 and 16 of the Act to Regulate Commerce and questions of discrimination, are stated in the opinion.

*Mr. John A. Garver* and *Mr. William A. Glasgow, Jr.*, for petitioner.

*Mr. John G. Johnson*, with whom *Mr. Edgar H. Boles*, *Mr. Frank H. Platt* and *Mr. George W. Field* were on the brief, for respondent. (See argument, *ante*, p. 412.)

By leave of court, *Mr. Joseph W. Folk* and *Mr. Charles W. Needham* filed a brief in behalf of the Interstate Commerce Commission.

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[R. JUSTICE VAN DEVANTER delivered the opinion of the court.

This is a companion case to that just decided and involves a claim for reparation similar to the second claim in that case, and arising out of the same rate. In this instance the shipper was Henry E. Meeker, who had succeeded to the business of Meeker & Company, the shippers in the other case, and the shipments in respect of which reparation is sought were made between April 13, 1908, and April 13, 1910. Otherwise the two cases differ only in amount. A complaint covering this claim was filed with the Interstate Commerce Commission April 13, 1910, before it passed upon the complaint covering the other. In its report of June 8, 1911, upon the earlier complaint the Commission referred to the later one and said (21 I. C. C. 129, 137): "As the subject-matter of the two complaints is the same, in so far as the reasonableness of the rates is concerned, the disposition of the later case will perhaps be determined by the conclusions reached in this case." In that report it found that the rate in question was excessive and unreasonable and that what would have been a reasonable rate, and directed a further hearing upon the matter of reparation. Such a hearing was had on both complaints and, on May 7, 1912, the Commission made a supplemental report, entitled "Reparation on both cases," in which it referred to its original report and the findings therein and, after dealing with the reparation sought in the first complaint (Commission's No. 1180), said of the present claim (23 I. C. C. 480, 482): "On basis of our decision in No. 1180, and upon consideration of the evidence submitted at the hearing of the present case regarding the amount of reparation due complainant, we now find that the rates exacted by defendant for the transportation of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy,

N. J., during the period from April 13, 1908, to April 13, 1910, were unreasonable to the extent that they exceeded rates of \$1.40 per gross ton on prepared sizes, \$1.30 on pea, and \$1.15 on buckwheat; that complainant shipped from said point of origin to said destination during the period above set forth, 46,772.02 tons of coal of prepared sizes, 26,972.06 tons of pea coal, and 22,004.09 tons of buckwheat coal; that complainant paid charges thereon, amounting to \$136,663.41, at the rates herein found to have been unreasonable, and was damaged to the extent of the difference between the amount which he did pay and \$125,849.81, the amount which he would have paid at the rates above found reasonable; and that he is, therefore, entitled to an award of reparation in the sum of \$10,813.60, with interest amounting to \$1,526.53 upon the individual charges comprising said sum from the dates of payment thereof to September 1, 1911, together with interest on said sum of \$10,813.60 from the 1st day of September, 1911.

"The exhibits showing details respecting the shipments upon which reparation is asked are too extensive to be set forth in this report. But inasmuch as the accuracy of the figures in said exhibits respecting the shipments made, freight charges paid, and reparation due, is conceded of record by defendant, we deem it unnecessary to make detailed findings respecting the numerous shipments involved."

Thereupon the Commission made and entered the following order:

"This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

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"It is ordered, That defendant Lehigh Valley Railroad Company be, and it is hereby authorized and required to pay unto complainant, Henry E. Meeker, on or before the 15th day of July, 1912, the sum of \$10,813.60, with interest at the rate of 6 per cent. per annum, amounting to \$1,526.53 upon the various individual charges comprising said sum, from the dates of payment thereof to September 1, 1911, as itemized in complainant's Exhibit 1, together with interest at the rate of 6 per cent. per annum on said sum of \$10,813.60 from September 1, 1911, as reparation for unreasonable rates charged for the transportation of various shipments of anthracite coal from the Wyoming coal region in Pennsylvania to Perth Amboy, N. J., which rates so charged have been found by this Commission to have been unreasonable, as more fully and at large appears in and by said report of the Commission."

The railroad company was duly served with a copy of the order, but refused to comply with it, and, on September 3, 1912, after the expiration of the period allowed for compliance, the claimant brought the present action in the District Court. The railroad company answered as in the other case. At the trial the plaintiff relied in the main upon the findings and order of the Commission as *prima facie* evidence of the facts therein stated, and no opposing evidence was presented. The plaintiff had a verdict and judgment for \$13,161.78, the amount of damages awarded by the Commission with interest. The court also allowed an attorney's fee of \$5,000, to be taxed and collected as part of the costs, one-half of the allowance being expressly attributed to services before the Commission and the other half to the services in the action. The case was taken to the Circuit Court of Appeals where the judgment was reversed with that in the other case. 211 Fed. Rep. 785. This case was then brought here in the same way as the other. 234 U. S. 749.

Save that the statute of limitations is not relied upon, the questions here presented are almost all identical with those in the other case, and in so far as they are the same they are sufficiently disposed of by what is there said. There are but two points of difference and they require only brief mention.

The Commission's report of June 8, 1911, finding the rate in question excessive and unreasonable and what would have been a reasonable rate was admitted in evidence over the defendant's objection that it was made in another and separate proceeding, that is, upon the complaint of Meeker & Company, and therefore was not admissible in this case for any purpose. The objection was rightly overruled. Without any doubt it was within the discretion of the Commission to permit Henry E. Meeker to intervene in respect of his individual claim in the proceeding begun by Meeker & Company or to consolidate his complaint with theirs. This, in effect, is what was done. The supplemental report so shows and it does not appear that the railroad company objected to that course or was in any way prejudiced by it. Besides, the reparation order recites that it was made after a full hearing and submission of the issues presented by the complaint and answer relating to this claim and there was no evidence tending to contradict the recital.

The further objection was made to the admission of the same report that it contained much that was not relevant to the case on trial, but the objection was overruled and it is fairly inferable from the record that the entire report was placed before the jury. It hardly could be said that the presence of some irrelevant matter rendered the whole report inadmissible, and yet the objection seems to have been made in that view. The objection would have been better founded had it been confined to what was deemed irrelevant. Of course, all that should have gone before the jury was the relevant findings

in the report, and counsel for the plaintiff ought not to have asked more. But we need not fix the responsibility for what occurred, for it is certain that the defendant was not harmed by it. The case made by the evidence rightly admitted was such as, in the absence of any opposing evidence, and there was none, clearly entitled the plaintiff to a verdict for the amount claimed. Every fact essential to a recovery, save the service of the reparation order and the refusal to comply with it, was *prima facie* established by the findings and order of the Commission and these could not be rejected by the jury in the absence of any countervailing evidence. *Kelly v. Jackson*, 6 Pet. 622, 632. The service of the order was expressly admitted and the refusal to comply with it was fully proved and practically conceded. Of course, harmless error constitutes no ground for reversal.

We conclude, therefore, that the judgment of the Circuit Court of Appeals must be reversed and that of the District Court must be modified by eliminating the allowance of an attorney's fee of \$2,500 for services before the Commission and affirmed as so modified.

*It is so ordered.*